CUSTOMS BULLETIN AND DECISIONS

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U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 93–57)

VESSEL REPAIR APPLICATIONS FOR RELIEF FROM DUTY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to increase the monetary jurisdictional authority of the three Customs Regional Vessel Repair Liquidation Units to decide whether to approve or disapprove certain applications for relief from the assessment of duties under the vessel repair statute. The increased authority is effective only in cases in which specifically applicable Customs Headquarters precedent exists. The effect of the amendment will be to expedite the disposition of routine cases and ensure earlier collection of vessel repair duties.

EFFECTIVE DATE: August 25, 1993.

FOR FURTHER INFORMATION CONTACT: Bruce Friedman, Office of Trade Operations, 202–927–0300 (operational matters), or Larry L. Burton, 202–482–6940 (legal matters).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 1466 of title 19 of the United States Code provides that a duty of 50 per cent ad valorem shall be assessed upon the value of repairs accomplished outside of the United States on certain American-flag vessels. The statute itself as well as numerous judicial and administrative interpretations provide exceptions to the assessment of duty under specific circumstances.

The statutory mandate is implemented under section 4.14 of the Customs Regulations (19 CFR 4.14), which provides the necessary working guidelines for Customs as well as vessel operators. Among the matters set forth in section 4.14 are the procedures for seeking administrative refund or remission of assessed duty. Necessary evidence is gathered in

one of three Vessel Repair Liquidation Units; the units are located in the New York Customs Region (New York, New York), the South Central Customs Region (New Orleans, Louisiana), and the Pacific Customs Region (San Francisco). Each of these locations is presently empowered to consider and decide initial requests for duty refund or remission (Application for Relief) when there exists clear Customs Headquarters precedent regarding the matter under consideration and when the decision will result in a refund or remission of less than $2,500 in duty (19 CFR 4.14(c)(2)).

Section 4.14 was significantly revised in 1980 by publication in the Federal Register of Treasury Decision 80–237 (45 FR 46560), September 30, 1980. The Customs field jurisdictional amount was first made a part of the Customs Regulations with that publication. At that time, the limit for field determination was set at $2,500 because to set it at a higher suggested limit would "preclude a central review of major issues" by Customs Headquarters.

Over the intervening years, the cost of foreign shipyard operations which give rise to "major issues" has been significantly inflated. In consideration of this factor, together with the development of necessary Customs expertise outside of Headquarters, Customs proposed in a document published in the Federal Register (57 FR 40627) on September 4, 1992, that it was appropriate that the jurisdictional limitation for determinations in the Regional Vessel Repair Liquidation Units be increased to $50,000 in cases in which there exists clear Customs Headquarters precedent.

Discussion of Comments

Three comments were received in response to the published proposal. Two of the comments expressed general support for the proposal but raised certain concerns. The third comment suggested that monetary limitations not be determinative for purposes of forwarding vessel repair cases to Customs Headquarters for review. A discussion of the comments follows.

The first commenter suggests that there be no monetary limitation at all placed upon jurisdictional determinations concerning the disposition of Applications for Relief from the assessment of vessel repair duties.

As indicated earlier, increase in the field jurisdiction from $2,500 to a new limit of $50,000 was proposed to take into account modern commercial realities as well as development of expertise outside of Headquarters. The new amount would represent a twenty-fold increase in field unit monetary authority. While Customs believes this increase is justified, it still believes a monetary limit is necessary to permit a central review of duty issues that exceed $50,000.

The second commenter appreciates the attempt to expedite the processing of entries by retaining more of them for processing outside of Customs Headquarters, but questions the readiness of the three regional liquidation units to handle the increased delegation. It is urged

that while increasing field authority, Headquarters should institute a quality assurance mechanism to ensure proper field disposition of Applications for Relief.

It should be remembered that the increase in field jurisdiction is intended to go only to the consideration of Applications for Relief, the first of three administrative relief vehicles available to vessel operators. Mechanisms are already built into the process in the form of Petitions for Review and Protests. These are utilized by vessel operators who may wish to appeal an adverse determination rendered on an Application for Relief. No change in the regulation as proposed is required.

The third and final commenter supports the increase in field authority, but is concerned that it may not receive sufficient information regarding decisions by the field as to why a particular item for which relief is sought is considered dutiable. Further, it is suggested that a time limit be placed on the Customs processing of Applications for Relief.

It is our experience that the field units are most responsive to inquiries from vessel operators regarding the justification for a particular determination. Customs Headquarters has not heard complaints from vessel operators about any lack of cooperation or the withholding of needed information by field units. We believe that the field units do a creditable job in supplying any necessary information to vessel operators. Finally, we believe that the imposition of any time limits as suggested would be unworkable since long delays often occur in the submission of vital information by the vessel operators themselves. We believe that there are not any intentional delays on the part of any party to the process, and are convinced that Customs is processing applications as soon as possible given constraints imposed by workloads and staffing levels. No changes are required in the regulations as proposed.

Conclusion

After careful consideration of the comments received and further review of the matter, it has been determined that the amendment as proposed should be adopted without change.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*, it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Carrier Rulings Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Reporting and recordkeeping requirements, Vessels.

AMENDMENT TO THE REGULATIONS

Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4, and the specific authority citation for section 4.14 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3;

* * * * * * *

Section 4.14 also issued under 19 U.S.C. 1466, 1498;

* * * * * * *

2. Section 4.14(c)(2) is amended by removing both references to "$2,500" where they appear in the paragraph, and inserting in their places references to "$50,000."

GEORGE J. WEISE,
Commissioner of Customs.

Approved: July 1, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 26, 1993 (58 FR 39654)]

(T.D. 93–58)

DELEGATION ORDER RELATING TO HANDLING OF APPEALS FILED BY CUSTOMS BROKERS FOR DENIAL OF LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of delegation order.

SUMMARY: This document provides notice that the Commissioner of Customs has delegated the authority to the Director of the Office of

Trade Operations to issue decisions both on the initial denial of applications for Customs broker licenses, including notification of a failing Customs broker examination score, and any subsequent appeal to Customs of such denial.

EFFECTIVE DATE: The delegation is effective as of June 18, 1993.

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Trade Operations, 202–927–0563.

SUPPLEMENTARY INFORMATION:

On June 18, 1993, the Commissioner of Customs approved the following delegation of authority:

> By virtue of the authority vested in me by Treasury Department Order No. 165, Revised (T.D. 53654, 19 F.R. 7241), as amended, and by section 641 of the Tariff Act of 1930 (19 U.S.C. 1641), I hereby delegate to the Director, Office of Trade Operations, the authority given to the Commissioner of Customs in the Customs Regulations, section 111.13(e), to notify applicants and the district director of the denial of a license because of failure to pass the Customs broker examination, and in sections 111.16 and 111.17, consistent with the authority delegated in section 111.13(e), to give notice of denial for any reason to an applicant and to the director of the district in which the application was filed and to review the appeals of Customs denials of applications for a Customs broker's license.

This delegation is effective as of June 18, 1993.

Dated: July 19, 1993.

MICHAEL H. LANE,
Acting Commissioner of Customs.

[Published in the Federal Register, July 26, 1993 (58 FR 39856)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 7, 10, and 148

DUTY-FREE TREATMENT OF ARTICLES IMPORTED FROM U.S. INSULAR POSSESSIONS

RIN 1515–AB14

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to clarify and update the legal requirements and procedures which apply for purposes of obtaining duty-free treatment on articles imported from insular possessions of the United States other than Puerto Rico. The document also proposes certain organizational changes to improve the layout of the existing regulations and proposes to clarify and update the personal exemption provisions applicable to returning residents.

DATES: Comments must be received on or before September 27,1993.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Craig Walker, Office of Regulations and Rulings (202–482–6980).

SUPPLEMENTARY INFORMATION:

Background

General Note 3(a)(iv) of the Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202) provides for duty-free treatment of goods imported from U.S. insular possessions provided that certain requirements or conditions are met. The General Note only applies to U.S. insular possessions which are outside the Customs territory of the United States (and thus does not apply to Puerto Rico which, under

General Note 2, HTSUS, is part of the Customs territory of the United States). Specifically, the principal insular possessions to which General Note 3(a)(iv) applies are the U.S. Virgin Islands, Guam, American Samoa, Wake Island, Midway Islands, and Johnston Atoll; other U.S. insular possessions outside the Customs territory, which are technically subject to the benefits accorded by General Note 3(a)(iv) but which are uninhabited and thus are not involved with transactions covered by that General Note, include Kingman Reef, Baker and Howland Islands, Jarvis Island, Navassa Island, and Palmyra Atoll. In addition, the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. 94–241, 90 Stat. 263 (the Covenant), provided in section 603(c) that "[i]mports from the Northern Mariana Islands into the customs territory of the United States will be subject to the same treatment as imports from Guam into the customs territory of the United States"; in C.S.D. 83–51, dated February 22, 1983, 17 Cust. Bull. 825 (1983), Customs interpreted this provision to mean that the Commonwealth of the Northern Mariana Islands (CNMI) is also entitled to the benefits conferred by General Note 3(a)(iv).

Duty-free treatment under General Note 3(a)(iv) applies to two classes of goods imported from insular possessions, as set forth in paragraph (A) thereunder. The first class involves goods which are either (1) "the growth or product of any such insular possession", or (2) "manufactured or produced in any such possession from materials [which are] the growth, product or manufacture of any such possession or of the customs territory of the United States, or of both". Under the terms of the General Note, duty-free treatment may be accorded to such goods only if two conditions are met: (1) the goods must come "to the customs territory of the United States directly from any such possession"; and (2) the goods must not "contain foreign materials to the value of more than 70 percent of their total value (or more than 50 percent of their total value with respect to goods described in section 213(b) of the Caribbean Basin Economic Recovery Act" (the CBERA, Title II of Public Law 98–67, 97 Stat. 384, codified at 19 U.S.C. 2701–2706 and also referred to as the Caribbean Basin Initiative or CBI). The General Note further provides in paragraph (B) that, in determining whether goods produced or manufactured in an insular possession contain foreign materials "to the value of more than 70 percent", a material shall not be considered foreign if the material may be imported into the Customs territory from a foreign country and entered free of duty either (1) at the time the goods produced or manufactured in the insular possession are entered, or (2) at the time the material is imported into the insular possession (as further discussed below, in this case the General Note requires that adequate documentation be provided to show that the material was incorporated into the goods during the 18–month period after the date on which the material was imported into the insular possession).

The second class of goods to which duty-free treatment applies under paragraph (A) of General Note 3(a)(iv) involves all goods imported from an insular possession which were previously imported into the Customs territory of the United States with payment of all applicable duties and taxes. The General Note provides in the case of such goods that (1) shipment of the goods from the United States must be "without remission, refund or drawback of such duties or taxes", (2) the goods must be shipped from the United States "directly to the possession", and (3) the goods must be returned to the United States from the possession "by direct shipment".

General Note 3(a)(iv) also contains three exceptions to the duty treatment provided for therein. The first exception refers to Additional U.S. Note 5 to Chapter 91, HTSUS, which sets forth special rules governing the dutiable status of articles classified in that HTSUS Chapter which are products of the U.S. Virgin Islands, Guam and American Samoa, including duty-free treatment for watch movements and watches without regard to the value of any non-Communist-country foreign materials but subject to annual quantitative limits. The second exception concerns Additional U.S. Note 2 to Chapter 96, HTSUS, which refers to certain buttons *(i.e.,* of acrylic resin, of polyester resin or of both such resins, whether or not covered with textile material) which are the product of an insular possession of the United States outside the Customs territory of the United States and which are manufactured or produced from button blanks or unfinished buttons which were the product of any foreign country. The third exception refers to section 423 of the Tax Reform Act of 1986 (set out at 19 U.S.C. 2703 note) which includes special rules applicable to ethyl alcohol and mixtures thereof for purposes of duty-free treatment under General Note 3(a)(iv). These three exceptions have relevance only in the context of that portion of General Note 3(a)(iv) which concerns goods produced in insular possessions. Thus, they do not limit or otherwise affect duty-free eligibility under that portion of the General Note which concerns goods previously imported into the Customs territory of the United States with payment of all applicable duties and taxes.

Section 7.8, Customs Regulations (19 CFR 7.8), addresses duty-free treatment under General Note 3(a)(iv).

Paragraph (a) concerns duty-free entry of articles produced in insular possessions and, except for shipments not valued over $100, provides for the submission of a certificate of origin on Customs Form 3229, signed by the chief or assistant chief customs officer at the port of shipment and showing that the merchandise is a product of the insular possession and complies with the maximum foreign materials content limitation. This paragraph also contains a footnote reference to identify the insular possessions and the agencies or governments responsible for their Customs administration.

Paragraph (b) refers to duty-free entry of articles returned to the United States from an insular possession in a shipment valued over

$100 and requires that the following evidence be filed in connection with the entry: (1) unless the district director is satisfied that no drawback of duties or refund or remission of taxes was allowed on the merchandise and except when the merchandise was shipped from the port at which entry is made and the fact of such shipment appears on Customs records, a certificate, on Customs Form 3311, of the district director at the port from which the merchandise was shipped from the United States, which is mailed by the issuing officer directly to the port at which it is to be used; and (2) except where the district director is satisfied that the merchandise was shipped directly to the insular possession and was returned by direct shipment, a declaration of the shipper in the insular possession identifying the merchandise and tracing the movement of the merchandise from the United States to the insular possession and from the insular possession back to the United States.

Paragraph (c) provides that when merchandise, other than shipments valued at $100 or less, arrives unaccompanied by a certificate of origin or a declaration of the shipper, or when any other document necessary to complete the entry is lacking, a bond for the production thereof may be taken on Customs Form 301. This paragraph also provides that a bond for production of a bill of lading shall be taken on Customs Form 301.

Paragraph (d) sets forth the manner in which compliance with the maximum foreign materials content limitation is to be determined. In this regard the paragraph states that a comparison shall be made between the actual purchase price of the foreign materials, plus the cost of transportation to the insular possession (but excluding any duties and taxes assessed by the insular possession and any charges which may accrue after landing), and the final appraised value in the United States determined in accordance with section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a), of the article brought into the United States. In connection with the reference to the actual purchase price of the foreign materials contained in an article, the paragraph excludes "any material which at the time such article is entered, or withdrawn from warehouse, for consumption in the United States, may be imported into the United States from a foreign country, other than Cuba or the Philippines, free of duty".

Paragraph (e) provides that a special Customs invoice on Customs Form 5515 shall be required in connection with shipment of dutiable merchandise valued over $500 unless the shipment would have been exempt from the requirement of a special Customs invoice under 19 CFR 141.83 if it had been imported from a foreign country, or when the shipment is covered by a certificate of origin provided for in paragraph (a).

Paragraph (f) provides that merchandise may be withdrawn from a bonded warehouse under section 557 of the Tariff Act of 1930, as amended (19 U.S.C. 1557), for shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam, without payment of duty, or with a refund of duty if the duties have been paid, in like manner as for exportation to foreign countries.

This paragraph further provides (1) that no drawback may be allowed under section 313 of the Tariff Act of 1930, as amended (19 U.S.C. 1313), on articles manufactured or produced in the United States and shipped to any insular possession and (2) that no drawback of internal-revenue tax is allowable under 19 U.S.C. 1313 on articles manufactured or produced in the United States with the use of domestic tax-paid alcohol and shipped to Wake Island, Midway Islands, Kingman Reef or Johnston Island.

A number of the provisions within section 7.8 discussed above do not reflect current law or are otherwise out-of-date. In this regard the following points are noted:

1. Paragraphs (a) and (d) currently refer to foreign materials to the value of "more than 50 percent", or "more than 70 percent" in the case of watches and watch movements. Thus, these two paragraphs do not reflect the changes made to the predecessor to General Note 3(a)(iv) (*i.e.*, General Headnote 3(a), Tariff Schedules of the United States (TSUS)) by (1) section 110 of Public Law 97–446, 96 Stat. 2329, which removed the reference to watches and watch movements so that they could be treated separately under the TSUS predecessor to Additional U.S. Note 5 to Chapter 91, HTSUS, discussed above, and (2) section 214(a) of the CBERA, which increased the maximum foreign materials content limitation to 70 percent except in the case of goods excluded from duty-free treatment under section 213(b) of that statute (as to which the 50 percent limit was retained). These statutory changes, which are reflected in the present wording of General Note 3(a)(iv) as discussed above, should also be reflected in these regulatory provisions.

2. The footnote which pertains to paragraph (a) fails to mention the U.S. Virgin Islands and also does not indicate that the benefits under General Note 3(a)(iv) have been extended to the CNMI. In addition, the footnote unnecessarily refers to some uninhabited insular possessions and does not in all cases reflect the correct possession name or customs administration responsibility; similar corrections in possession nomenclature should be made in paragraph (f).

3. In paragraphs (a) and (b), the "$100" figure in regard to the value of shipments has reference to an outdated line of demarcation between formal and informal entries. Under 19 U.S.C. 1498 and 19 CFR 143.21, the current line of demarcation is, with some exceptions, $1,250.

4. Paragraph (c) should be removed to reduce the paperwork burden on the public.

5. The reference in paragraph (d) to any material imported into the United States from a foreign country "other than Cuba or the Philippines" free of duty does not reflect current law. This reference reflects language that was contained in section 401 of the Customs Simplification Act of 1954, Public Law 768, 68 Stat. 1139, which amended the Tariff Act of 1930 by adding a new section 301 (codified at 19 U.S.C. 1301a) relating to rates of duty applicable to articles from U.S. insular possessions. Section 301 was repealed in connection with the adoption

of the TSUS which incorporated section 301 as General Headnote 3(a). Although General Headnote 3(a), TSUS, originally included the references to Cuba and the Philippines, those references were subsequently removed from General Headnote 3(a) and thus were not carried over into General Note 3(a)(iv), HTSUS. Accordingly, the references should be removed from the regulatory text.

6. Paragraph (e) concerning the submission of a special Customs invoice (Customs Form 5515) should be removed because the special Customs invoice was eliminated by T.D. 85–39, 50 FR 9610. Although T.D. 85–39 attempted to remove all references to the special Customs invoice in the Customs Regulations, section 7.8(e) was overlooked in this regard.

In addition to the above, Customs notes that, as compared to the regulations implementing the Generalized System of Preferences (GSP), set forth as sections 10.171–10.178, Customs Regulations (19 CFR 10.171–10.178), and the regulations implementing the CBI, set forth as sections 10.191–10.198, Customs Regulations (19 CFR 10.191–10.198), section 7.8 does not reflect all of the provisions of General Note 3(a)(iv) and does not provide adequate guidance concerning the legal effect of those provisions, particularly as regards the determination of the origin of goods imported from insular possessions, the meaning of direct shipment to or from an insular possession, and the application of the maximum foreign materials content limitation. Moreover, Customs believes that certain organizational improvements could be made to the existing regulatory provisions covering the insular possessions, including the transfer of present section 10.181 (19 CFR 10.181) to Part 7 since that section applies only to insular possessions and thus more properly falls within the specific context of Part 7.

Finally, Customs notes that a number of provisions within Part 148 of the Customs Regulations (19 CFR Part 148), which concerns personal declarations and exemptions, require changes to reflect the current duty exemption provisions applicable both to residents returning from American Samoa, Guam and the U.S. Virgin Islands and to residents returning from CBI beneficiary countries either directly or through one of those insular possessions, as set forth in Subchapters IV and XVI of Chapter 98, HTSUS. In addition, Customs has taken the position that section 603(c) of the Covenant as discussed above also had the effect of extending those personal exemption provisions to residents returning from the CNMI, with the result that a reference to the CNMI should be added to various provisions within Part 148.

Accordingly, Customs proposes to extensively revise and reorganize the regulatory provisions in Part 7 dealing with U.S. insular possessions other than Puerto Rico and to update various personal exemption provisions in Part 148. The specific amendments proposed in this document are discussed in detail below.

DISCUSSION OF PROPOSED AMENDMENTS

New section 7.2:

This section is intended to identify the U.S. insular possessions other than Puerto Rico and to describe their legal status for Customs purposes.

Paragraph (a) generally describes the tariff status of imports from insular possessions under U.S. law and identifies the insular possessions. Reference is made to duty treatment as provided in (new) section 7.3 which covers General Note 3(a)(iv), HTSUS, and as provided in Part 148 (simply for cross-reference purposes as regards the personal exemptions for residents returning from American Samoa, Guam or the U.S. Virgin Islands). The references to the specific insular possessions replace the references in the footnote to present section 7.8(a) but with the following changes: (1) only the principal *(i.e.,* inhabited) insular possessions as discussed above are named; (2) reference is made to Johnston "Atoll" rather than "Island" to reflect current usage; and (3) a reference to the privilege accorded to the CNMI under the Covenant has been included with citation to new section 7.3 and Part 148 which both apply to the CNMI under section 603(c) of the Covenant.

Paragraph (b) corresponds to the remainder of the text of the footnote to present section 7.8(a) regarding the customs administration of the insular possessions, updated as necessary but excluding the U.S. Virgin Islands which are dealt with in paragraph (c).

Paragraph (c) concerns the Customs administration of the U.S. Virgin Islands which is different from that of the other insular possessions and the CNMI. This paragraph reflects authority conferred on the Secretary of the Treasury by 48 U.S.C. 1406i.

New section 7.3:

This section is intended to replace the body of present section 7.8.

Paragraph (a) sets forth the basic statutory requirements for duty-free treatment under General Note 3(a)(iv), HTSUS. Paragraph (a)(1) concerns the first class of goods covered by the General Note, *i.e.,* goods produced in an insular possession, which are referred to in present section 7.8(a); this paragraph also references the three types of products discussed above which are expressly excepted from duty-free treatment in this context under the General Note. Paragraph (a)(2) covers the second class of goods covered by the General Note (that is, goods previously imported into the United States and shipped to an insular possession and returned) which are referred to in present section 7.8(b).

Paragraph (b) sets forth the standards for determining the origin of goods imported from insular possessions for purposes of duty-free treatment under paragraph (a)(1). Paragraph (b)(1) concerns goods "wholly obtained or produced" and refers in this regard to the meaning contained in "§ 102.1(e) of this chapter" which is set forth as part of proposed regulatory amendments regarding rules of origin published in the Federal Register on September 25, 1991, at 56 FR 48448; final action on

this aspect of the present document will of course depend in part on what final action is taken on the referenced regulatory text contained in that earlier document. Paragraph (b)(2) sets forth the basic substantial transformation ("new and different article of commerce") rule which has traditionally been used in the United States to determine the origin of products not wholly obtained or produced in one country, including for purposes of duty-free treatment of goods imported from insular possessions.

Paragraph (c) is intended to clarify the meaning of "foreign materials" for purposes of applying the foreign materials content limitation under paragraph (a)(1). To this end, the paragraph refers to all materials which are not treated as foreign under the terms of General Note 3(a)(iv).

Paragraphs (c)(1) and (2) cover materials that have their origin in an insular possession or in the Customs territory of the United States and thus reflects the longstanding position of Customs that such materials are intended to be treated as non-foreign under the wording of General Note 3(a)(iv)(A). The origin principles set forth in these paragraphs are the same as those applicable to goods under paragraph (b). This treatment of the origin standards applicable to materials, in regulatory provisions separate from the provisions applicable to the origin of goods incorporating such materials, mirrors the approach taken in the GSP and CBI regulations cited above. Paragraph (c)(2) is based on the wording of section 10.196(a)(2) of the CBI regulations and is intended to reflect the position taken by Customs in T.D. 88–17, 53 FR 12143, which approved application of the double substantial transformation test in determining the foreign material content of goods imported from insular possessions.

Paragraph (c)(3) covers materials that may be imported into the Customs territory of the United States from a foreign country and entered free of duty, as specifically provided in General Note 3(a)(iv)(B). Since the General Note in this context only refers to foreign materials to the value of more than "70 percent" as noted above, the scope of the regulatory text must be similarly limited. The proviso at the end of proposed paragraph (c)(3)(ii) is intended to reflect the substantive effect of the documentary requirement at the end of General Note 3(a)(iv)(B). Although General Note 3(a)(iv)(B) states in this regard that "no goods containing [a material described in proposed paragraph (c)(3)(ii)] shall be *exempt from duty* under subparagraph (A)" (emphasis added) unless the required documentation is supplied, given the clear "foreign materials" context of subparagraph (B) of the General Note, Customs believes that this proviso should be limited in the regulations to that foreign materials context rather than be applied in the broader context of duty-free eligibility of the imported goods.

Paragraph (d) sets forth the manner in which compliance with the General Note foreign materials content limitation is to be determined. Although based on present section 7.8(d), this provision (1) incorporates

the necessary substantive changes discussed above and (2) follows the GSP and CBI regulations regarding the cost of a material provided to the manufacturer without charge or at less than fair market value.

Paragraph (e) sets forth the meaning of direct shipment for purposes of the section and does not provide for any exceptions to direct movement to or from the insular possession without passing through any foreign territory or country. Although the absence of exceptions to this strict rule is at variance with the regulatory treatment of the similar "imported directly" requirement under the GSP (see 19 CFR 10.175) and under the CBI (see 19 CFR 10.193), Customs believes that exceptions should not be provided in the present case for the following reasons: (1) the general absence of any intervening foreign territories or countries between the insular possessions and the United States obviates the need for such transshipments; (2) inclusion of exceptions to the strict rule would necessitate an increase in the regulatory burden in the form of additional documentary evidence to show compliance as is the case under the GSP and CBI regulations; and (3) given the generally more liberal tariff treatment under General Note 3(a)(iv) as compared to the GSP and the CBI, and in view of the connection between the direct shipment requirement and the determination of the origin of the imported goods, a more strict standard is necessary in the present case in order to ensure both that the intended benefits accrue to the insular possessions and that the interests of domestic industries are adequately protected from potential abuse of the General Note provisions.

Paragraph (f) sets forth documentary requirements for purposes of duty-free treatment under the General Note. Paragraph (f)(1) concerns goods for which duty-free treatment is claimed under the provisions applicable to products of insular possessions. Although this paragraph is derived from the documentary requirements in present section 7.8(a) (involving use of Customs Form 3229, Certificate of Origin, which will be revised to reflect all current legal requirements under General Note 3(a)(iv)), the paragraph also provides, consistent with the practice under the GSP and CBI regulations, that the certificate of origin shall not be required if the district director is otherwise satisfied that the goods qualify for duty-free treatment. In addition, the certificate of origin would not be required for informal entries, and in this regard the paragraph simply refers to section 143.21 of the regulations which sets forth the current value limits for shipments eligible for informal entry. However, in a case where the goods incorporate a nondutiable material not treated as a foreign material under General Note 3(a)(iv) and proposed paragraph (c)(3)(ii), the certificate of origin will be required because General Note 3(a)(iv)(B) mandates that documentary evidence be provided to show that the material was incorporated in the goods within the specified 18–month period.

Paragraph (f)(2) concerns documentation applicable to goods previously imported and returned to the United States and is based on present section 7.8(b). However, Customs is proposing an alternative to

continued use of a certificate on Customs Form 3311, Declaration for Free Entry of Returned American Products, as provided in present section 7.8(b)(1) because this certification procedure is cumbersome and in fact rarely used. In place of the certificate on Customs Form 3311, proposed paragraph (f)(2)(ii) sets forth the text of a declaration by the U.S. importer which would refer to the declaration by the insular possession shipper required under present section 7.8(b)(2) and set forth in proposed paragraph (f)(2)(i). This new declaration of the U.S. importer (which is principally intended to establish that there was no remission, refund or drawback of duties or taxes when the goods were shipped to the insular possession, as is the main purpose of the certificate on Customs Form 3311) could be included on, or attached to, the declaration by the insular possession shipper. However, none of the documentation specified in paragraph (f)(2) would be required if the shipment is eligible for informal entry under section 143.21 of the regulations or if the district director is otherwise satisfied that the goods qualify for the claimed duty-free treatment.

Paragraph (g), which concerns warehouse withdrawals and drawback, is taken from present section 7.8(f). This proposed paragraph follows the present provision without substantive change except (1) in the first sentence, reference is made to "any insular possession of the United States other than Puerto Rico" in lieu of naming those insular possessions and (2) in the last sentence, the reference to Kingman Reef has been deleted and Johnston "Island" has been changed to "Atoll".

New section 7.4 (present section 10.181):

In addition to the transfer of present section 10.181 to Part 7 as new section 7.4, three minor editorial amendments have been made to the section.

Removal of present section 7.8:

As a consequence of the proposed adoption of new sections 7.2 and 7.3 which are intended to replace present section 7.8, Customs proposes to remove section 7.8.

Part 148:

The proposed modifications within Part 148 involve mainly (1) adding a reference to the CNMI wherever a reference to Guam appears, (2) changing "$800" to read "$1,200" throughout to reflect the personal exemption limit applicable to residents returning from American Samoa, Guam, the CNMI and the U.S. Virgin Islands and adding, where textually appropriate, a reference to the $600 portion thereof that can be acquired in CBI beneficiary countries, as currently provided in subheading 9804.00.70, HTSUS, (3) adding references to the separate $600 exemption applicable to residents returning from CBI beneficiary countries, as currently provided in subheading 9804.00.72, HTSUS, and (4) updating the tobacco and alcoholic beverage provisions to reflect the current limits specified in those two HTSUS subheadings. In addition, one "$800" reference to the flat rate of duty allowance is being corrected

to read "$1,000" to reflect the current limit applicable under subheadings 9816.00.20 and 9816.00.40, HTSUS.

COMMENTS

Before adopting the proposed amendments, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. The amendments primarily reflect statutory requirements that have been in effect for many years and, thus, any economic impact arising out of these amendments would be negligible at best. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to Customs at the address set forth previously.

The collection of information in these proposed regulations is in section 7.3. This information conforms to requirements in General Note 3(a)(iv), HTSUS, and is used by Customs to determine whether goods imported from insular possessions are entitled to duty-free entry under that General Note. The likely respondents are business organizations including importers, exporters, and manufacturers.

Estimated total annual reporting and/or recordkeeping burden: _____ hours.

The estimated average annual burden per respondent/recordkeeper is _____ hours.

Estimated number of respondents and/or recordkeepers: _____.
Estimated annual frequency of responses: _____.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 7
Customs duties and inspection, Imports, Insular possessions.

19 CFR Part 10
Customs duties and inspection, Imports.

19 CFR Part 148
Customs duties and inspection, Imports, Personal exemptions.

PROPOSED AMENDMENTS TO THE REGULATIONS

Accordingly, it is proposed to amend Parts 7, 10 and 148, Customs Regulations (19 CFR Parts 7, 10 and 148), as set forth below:

PART 7—CUSTOMS REGULATIONS WITH INSULAR POSSESSIONS AND GUANTANAMO BAY NAVAL STATION

1. The authority citation for Part 7 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1623, 1624; 48 U.S.C. 1406i.

2. Sections 7.2 and 7.3 are added to read as follows:

§ 7.2 Insular possessions of the United States other than Puerto Rico.

(a) Insular possessions of the United States other than Puerto Rico are also American territory but, because those insular possessions are outside the customs territory of the United States, goods imported therefrom are subject to the rates of duty set forth in column 1 of the Harmonized Tariff Schedule of the United States (HTSUS) except as otherwise provided in § 7.3 of this part or in part 148 of this chapter. The principal such insular possessions are the U.S. Virgin Islands, Guam, American Samoa, Wake Island, Midway Islands, and Johnston Atoll. Pursuant to § 603(c) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Public Law 94–241, 90 Stat. 263, 270, goods imported from the Commonwealth of the Northern Mariana Islands are entitled to the same tariff treatment as imports from Guam and thus are also subject to the provisions of § 7.3 of this part and of part 148 of this chapter.

(b) Importations into Guam, American Samoa, Wake Island, Midway Islands, Johnston Atoll, and the Commonwealth of the Northern Mariana Islands are not governed by the Tariff Act of 1930, as amended,

or the regulations contained in this chapter. The customs administration of Guam is under the Government of Guam. The customs administration of American Samoa is under the Government of American Samoa. The customs administration of Wake Island is under the jurisdiction of the Department of the Air Force (General Counsel). The customs administration of Midway Islands is under the jurisdiction of the Department of the Navy. There is no customs authority on Johnston Atoll, which is under the operational control of the Defense Nuclear Agency. The customs administration of the Commonwealth of the Northern Mariana Islands is under the Government of the Commonwealth.

(c) The Secretary of the Treasury administers the customs laws of the U.S. Virgin Islands through the United States Customs Service. The importation of goods into the U.S. Virgin Islands is governed by Virgin Islands law; however, in situations where there is no applicable Virgin Islands law or no U.S. law specifically made applicable to the Virgin Islands, U.S. laws and regulations shall be used as a guide and be complied with as nearly as possible. Tariff classification of, and rates of duty applicable to, goods imported into the U.S. Virgin Islands are established by the Virgin Islands legislature.

§ 7.3 Duty-free treatment of goods imported from insular possessions of the United States other than Puerto Rico.

(a) *General.* Under the provisions of General Note 3(a)(iv), HTSUS, the following goods may be eligible for duty-free treatment when imported into the customs territory of the United States from an insular possession of the United States:

(1) Except as provided in Additional U.S. Note 5 to Chapter 91, HTSUS, and except as provided in Additional U.S. Note 2 to Chapter 96, HTSUS, and except as provided in section 423 of the Tax Reform Act of 1986, as amended (19 U.S.C. 2703 note), goods which are the growth or product of any such insular possession, and goods which were manufactured or produced in any such insular possession from materials that were the growth, product or manufacture of any such insular possession or of the customs territory of the United States, or of both, provided that such goods:

(i) Do not contain foreign materials valued at either more than 70 percent of the total value of the goods or, in the case of goods described in section 213(b) of the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703(b)), more than 50 percent of the total value of the goods; and

(ii) Come to the customs territory of the United States directly from any such insular possession; and

(2) Goods previously imported into the customs territory of the United States with payment of all applicable duties and taxes imposed upon or by reason of importation, provided that:

(i) The goods were shipped from the United States directly to the insular possession and are returned from the insular possession to the United States by direct shipment; and

(ii) There was no remission, refund or drawback of such duties or taxes in connection with the shipment of the goods from the United States to the insular possession.

(b) *Origin of goods.* For purposes of this section, goods shall be considered to be the growth or product of, or manufactured or produced in, an insular possession if:

(1) The goods were "wholly obtained or produced" in the insular possession within the meaning of § 102.1(e) of this chapter; or

(2) The goods became a new and different article of commerce as a result of processing performed in the insular possession.

(c) *Foreign materials.* For purposes of this section, the term "foreign materials" covers any material incorporated in goods described in paragraph (b)(2) of this section other than:

(1) A material which was "wholly obtained or produced" in an insular possession or in the customs territory of the United States within the meaning of § 102.1(e) of this chapter;

(2) A material which was substantially transformed in an insular possession or or in the customs territory of the United States into a new and different article of commerce which was then used in an insular possession in the production or manufacture of a new and different article which is shipped directly to the United States; or

(3) In the case of imported goods to which the 70 percent foreign materials value limitation applies as set forth in paragraph (a)(1)(i) of this section, a material which may be imported into the customs territory of the United States from a foreign country and entered free of duty either:

(i) At the time the goods which incorporate the material are entered; or

(ii) At the time the material is imported into the insular possession, provided that the material was incorporated into the goods during the 18–month period after the date on which the material was imported into the insular possession.

(d) *Foreign materials value limitation.* For purposes of this section, the determination of whether goods contain foreign materials valued at more than 70 or 50 percent of the total value of the goods shall be made based on a comparison between:

(1) The landed cost of the foreign materials, consisting of:

(i) The manufacturer's actual cost for the materials or, where a material is provided to the manufacturer without charge or at less than fair market value, the sum of all expenses incurred in the growth, production, or manufacture of the material, including general expenses, plus an amount for profit; and

(ii) The cost of transporting those materials to the insular possession, but excluding any duties or taxes assessed on the materials by the insular possession and any charges which may accrue after landing); and

(2) The final appraised value of the goods imported into the customs territory of the United States, as determined in accordance with section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a).

(e) *Direct shipment.* For purposes of this section, goods shall be considered to come directly from an insular possession, or to be shipped directly to an insular possession and returned by direct shipment, only if the goods proceed directly to or from the insular possession without passing through any foreign territory or country.

(f) *Documentation.*

(1) When goods are sought to be admitted free of duty as provided in paragraph (a)(1) of this section, there shall be filed with the entry/entry summary a properly completed certificate of origin on Customs Form 3229, signed by the chief or assistant chief customs officer or other official responsible for customs administration at the port of shipment, showing that the goods comply with the requirements for duty-free entry set forth in paragraph (a)(1) of this section. Except in the case of goods which incorporate a material described in paragraph (c)(3)(ii) of this section, a certificate of origin shall not be required for any shipment eligible for informal entry under § 143.21 of this chapter or in any case where the district director is otherwise satisfied that the goods qualify for duty-free treatment under paragraph (a)(1) of this section.

(2) When goods in a shipment not eligible for informal entry under § 143.21 of this chapter are sought to be admitted free of duty as provided in paragraph (a)(2) of this section, the following shall be filed with the entry/entry summary unless the district director is satisfied by reason of the nature of the goods or otherwise that the goods qualify for such duty-free entry:

(i) A declaration by the shipper in the insular possession in substantially the following form:

I, _____ (name) of _____(organization) do hereby declare that to the best of my knowledge and belief the goods identified below were sent directly from the United States on _____, 19__, to _____ (name of) _____ (organization) on _____ (insular possession) via the _____ (name of carrier) and that the goods remained in said insular possession until shipped by me directly to the United States via the _____, (name of carrier) on _____ 19__.

Marks	Numbers	Quantity	Description	Value

Dated at _____, this _____ day of _____, 19__.

Signature: _____.

(ii) A declaration by the importer in the United States in substantially the following form:

I,_____(name), of_____(organization) declare that the (above) (attached) declaration by the shipper in the insular possession is true and correct to the best of my knowledge and belief, that the goods in question were previously imported into the customs territory of the United States and were shipped to the insular possession from the United States without remission, refund or drawback of any duties or taxes paid in connection with that prior importation, and that the goods arrived in the United States directly from the insular possession via the _____ (name of carrier) on _____, 19__.

_____ (Date) _____ (Signature)

(g) *Warehouse withdrawals; drawback.* Merchandise may be withdrawn from a bonded warehouse under section 557 of the Tariff Act of 1930, as amended (19 U.S.C. 1557), for shipment to any insular possession of the United States other than Puerto Rico without payment of duty, or with a refund of duty if the duties have been paid, in like manner as for exportation to foreign countries. No drawback may be allowed under section 313 of the Tariff Act of 1930, as amended (19 U.S.C. 1313), on goods manufactured or produced in the United States and shipped to any insular possession. No drawback of internal-revenue tax is allowable under 19 U.S.C. 1313 on goods manufactured or produced in the United States with the use of domestic tax-paid alcohol and shipped to Wake Island, Midway Islands or Johnston Atoll.

3. Section 7.8 and footnote 5 thereto are removed.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10 continues to read in part as follows:

* * * * * * *

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624;

2. Section 10.181 is redesignated as § 7.4, and newly redesignated § 7.4 is amended as follows:

(a) Paragraph (b) is amended by adding the word "the" before the words "Department of Commerce".

(b) Paragraph (g), second sentence, is amended by removing the words "Form ITA–360" and adding, in their place, the words "Form ITA–361".

(c) Paragraph (h) is amended by removing the word "Department" and adding, in its place, the word "Departments".

PART 148 – PERSONAL DECLARATIONS AND EXEMPTIONS

1. The authority citation for Part 148 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1496, 1624. The provisions of this part, except for subpart C, are also issued under General Note 8, Harmonized Tariff Schedule of the United States, 19 U.S.C. 1202;

* * * * * * *

Sections 148.43, 148.51, 148.63, 148.64, 148.74 also issued under 19 U.S.C. 1321;

* * * * * * *

2. Section 148.2(b), first sentence, is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,".

3. Section 148.12(b)(1)(i) is revised to read as follows:

§ 148.12 Oral declarations.

* * * * * * *

(b) * * *

(1) * * *

(i) The aggregate fair retail value in the country of acquisition of all accompanying articles acquired abroad by him and of alterations and dutiable repairs made abroad to personal and household effects taken out and brought back by him does not exceed:

(A) $400; or

(B) $600 in the case of a direct arrival from a beneficiary country as defined in § 10.191(b)(1) of this chapter, not more than $400 of which shall have been acquired elsewhere than in beneficiary countries; or

(C) $1,200 in the case of a direct or indirect arrival from American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the United States, not more than $400 of which shall have been acquired elsewhere than in such locations except that up to $600 of which may have been acquired in one or more beneficiary countries as defined in § 10.191(b)(1) of this chapter;

* * * * * * *

4. Sections 148.17(b) and (c) are amended by removing the words "$400 or $800" and adding, in their place, the words "$400, $600 or $1,200".

5. Section 148.31(a), first sentence, is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,".

6. Section 148.31(b) is amended by removing the words "$400 or $800" and adding, in their place, the words "$400, $600 or $1,200".

7. Section 148.32(d)(2) is amended by removing the words "$400 or $800" and adding, in their place, the words "$400, $600 or $1,200".

8. Section 148.33 is amended by revising paragraphs (a), (b), (d) and (f) to read as follows:

§ 148.33 Articles acquired abroad.

(a) *Exemption.* Each returning resident is entitled to bring in free of duty and internal revenue tax under subheadings 9804.00.65, 9804.00.70 and 9804.00.72, and Chapter 98, U.S. Note 3, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202), articles for his personal or household use which were purchased or otherwise acquired abroad merely as an incident of the foreign journey from which he is returning, subject to the limitations and conditions set forth in this section and §§ 148.34–148.38. The aggregate fair retail value in the country of acquisition of such articles for personal and household use shall not exceed:

(1) $400, and provided that the articles accompany the returning resident;

(2) whether or not the articles accompany the returning resident, $600 in the case of a direct arrival from a beneficiary country as defined in § 10.191(b)(1) of this chapter, not more than $400 of which shall have been acquired elsewhere than in beneficiary countries; or

(3) whether or not the articles accompany the returning resident, $1,200 in the case of a direct or indirect arrival from American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the United States, not more than $400 of which shall have been acquired elsewhere than in such locations except that up to $600 of which may have been acquired in one or more beneficiary countries as defined in § 10.191(b)(1) of this chapter.

(b) *Application to articles of highest rate of duty.* The $400, $600 or $1,200 exemption shall be applied to the aggregate fair retail value in the country of acquisition of the articles acquired abroad which are subject to the highest rates of duty. If an internal revenue tax is applicable, it shall be combined with the duty in determining which rates are highest.

* * * * * * *

(d) *Tobacco products and alcoholic beverages.* Cigars, cigarettes, manufactured tobacco, and alcoholic beverages, may be included in the exemption to which a returning resident is entitled, with the following limits:

(1) No more than 200 cigarettes and 100 cigars may be included, except that in the case of American Samoa, Guam, the Commonwealth of the Northern Mariana Islands and the Virgin Islands of the United States the cigarette limit is 1,000, not more than 200 of which shall have been acquired elsewhere than in such locations;

(2) No alcoholic beverages shall be included in the case of an individual who has not attained the age of 21; and

(3) No more than 1 liter of alcoholic beverages may be included, except that:

(i) An individual returning directly or indirectly from American Samoa, Guam, the Commonwealth of the Northern Mariana Islands or the Virgin Islands of the United States may include in the exemption not

more than 5 liters of alcoholic beverages, not more than 1 liter of which shall have been acquired elsewhere than in such locations and not more than 4 liters of which shall have been produced elsewhere than in such locations; and

(ii) An individual returning directly from a beneficiary country as defined in § 10.191(b)(1) of this chapter may include in the exemption not more than 2 liters of alcoholic beverages if at least 1 liter is the product of one or more beneficiary countries.

* * * * * * *

(f) *Remainder not applicable to subsequent journey.* A returning resident who has received a total exemption of less than the $400, $600 or $1,200 maximum in connection with his return from one journey is not entitled to apply the unused portion of that maximum amount to articles acquired abroad on a subsequent journey.

9. Section 148.34(a) is amended by removing the words "$400 or $800" wherever they appear and adding, in their place, the words "$400, $600 or $1,200".

10. Section 148.35 is amended by revising paragraphs (a) and (b) to read as follows:

§ 148.35 Length of stay for exemption of articles acquired abroad.

(a) *Required for allowance of $400, $600 or $1,200 exemption.* Except as otherwise provided in this paragraph or in paragraph (b) of this section, the $400, $600 or $1,200 exemption for articles acquired abroad shall not be allowed unless the returning resident has remained beyond the territorial limits of the United States for a period of not less than 48 hours. The $400 exemption may be allowed on articles acquired abroad by a returning resident arriving directly from Mexico without regard to the length of time the person has remained outside the territorial limits of the United States.

(b) *Not required for allowance of $1,200 exemption on return from Virgin Islands.* The $1,200 exemption applicable in the case of the arrival of a returning resident directly or indirectly from the Virgin Islands of the United States may be allowed without regard to the length of time such person has remained outside the territorial limits of the United States.

* * * * * * *

11. Section 148.36, paragraphs (a) and (b), are amended by removing the words "$400 or $800" wherever they appear and adding, in their place, the words "$400, $600 or $1,200".

12. Section 148.37, paragraphs (a), (b) and (c), are amended by removing the words "$400 or $800" wherever they appear and adding, in their place, the words "$400, $600 or $1,200".

13. Section 148.38 is amended by removing the words "$400 or $800" and adding, in their place, the words "$400, $600 or $1,200".

14. Section 148.51 is amended by revising paragraph (a)(2) to read as follows:

§ 148.51 Special exemption for personal or household articles.

(a) * * *

(2) A returning resident who is not entitled to the $400, $600 or $1,200 exemption for articles acquired abroad under subheading 9804.00.65, 9804.00.70 or 9804.00.72, HTSUS (see Subpart D of this part).

* * * * * * *

15. Section 148.64(a), first sentence, is amended by removing the words "subheadings 9804.00.30 or 9804.00.70," and adding, in their place, the words "subheading 9804.00.30, 9804.00.65, 9804.00.70 or 9804.00.72,".

16. Section 148.74(c)(3) is amended by removing the words "subheading 9804.00.65 and 9804.00.70," and adding, in their place, the words "subheading 9804.00.65, 9804.00.70 or 9804.00.72,".

17. In section 148.101, the sixth sentence is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,"; and example 2 is amended by removing the figure "$2,900" in the example text and adding, in its place, the figure "$4,900", by removing the figure "$800" wherever it appears in the example text and table and adding, in its place, the figure "$1,200", by removing the figure "$1,600" in the table column headed "Fair retail value" and adding, in its place, the figure "$2,400", by removing the figure "$4,100" in the table column headed "Fair retail value" and adding, in its place, the figure "$4,900", and by removing the figure "$1,00" in the table column headed "Duty" and adding, in its place, the figure "$100".

18. Section 148.102 is amended by revising paragraphs (a) and (b) to read as follows:

§ 148.102 Flat rate of duty.

(a) *Generally.* The rate of duty on articles accompanying any person, including a crewmember, arriving in the United States (exclusive of duty-free articles and articles acquired in Canada, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the United States) shall be 10 percent of the fair retail value in the country of acquisition.

(b) *American Samoa, Guam, the Northern Mariana Islands, and the Virgin Islands.* The rate of duty on articles accompanying any person, including a crewmember, arriving in the United States directly or indirectly from American Samoa, Guam, the Commonwealth of the Northern Mariana Islands or the Virgin Islands of the United States (exclusive of duty-free articles), acquired in these locations as an incident of the person's physical presence there, shall be 5 percent of the fair retail value in the location in which acquired.

* * * * * * *

19. Section 148.104(c) is amended by removing the figure "$800" and adding, in its place, the figure "$1,000".

20. The heading to Subpart K is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,".

21. In section 148.110, the first paragraph is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,"; and the second paragraph is amended by adding after "Guam" the words ", the Commonwealth of the Northern Mariana Islands,".

22. In section 148.111, the introductory text is amended by adding after "Guam," the words "the Commonwealth of the Northern Mariana Islands,"; and paragraph (a) is amended by removing the figure "$800" and adding, in its place, the figure "1,200".

23. Section 148.113(a), first sentence, is amended by removing the figure "800" and adding, in its place, the figure "1,200".

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: July 1, 1993.

RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 27, 1993 (58 FR 40095)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

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Jane A. Restani
Thomas J. Aquilino, Jr.
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R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

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Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–128)

GENERAL MOTORS CORP., FORD MOTOR CO., AND CHRYSLER CORP., PLAINTIFFS *v.* UNITED STATES, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND TOYOTA MOTOR CORP., TOYOTA MOTOR SALES, USA, INC., MAZDA MOTOR CORP., AND MAZDA MOTOR OF AMERICA, INC., DEFENDANT-INTERVENORS

Court No. 92–08–00537

[ITC determination sustained.]

(Dated July 12, 1993)

Wilmer, Cutler & Pickering (John D. Greenwald and *Stavros J. Lambrinidis)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Assistant General Counsel, United States International Trade Commission *(Edwin J. Madaj)* for defendant.

Akin, Gump, Strauss, Hauer & Feld (Warren E. Connelly and *James D. Southwick)* for defendant-intervenors, Mazda Motor Corporation and Mazda Motor of America, Inc., *Timothy J. Conley,* General Counsel, of counsel, for Mazda Motor of America, Inc.

Squire, Sanders & Dempsey (Ritchie T. Thomas, Robert H. Huey, James V. Dick and *Miriam A. Bishop)* for defendant-intervenors, Toyota Motor Corporation and Toyota Motor Sales, U.S.A., Inc., *William A. Plourde, Jr.* and *Barbara E. Arnold,* of counsel, for defendant-intervenor, Toyota Motor Sales, U.S.A., Inc.

OPINION

RESTANI, *Judge:* In *Minivans from Japan,* USITC Pub. 2529, Inv. No. 731–TA–522 (July 1992) *("Final Det.")*, a majority of the commissioners of the International Trade Commission ("ITC") found that the United States minivan industry was not materially injured or threatened with material injury due to less than value ("LTFV") sales of Japanese minivans. Plaintiffs, General Motors Corporation ("GM"), Ford Motor Company, and Chrysler Corporation, challenge the determination.[1]

I. BACKGROUND

A. *The Minivans:*

Minivans are on-road motor vehicles with certain distinct characteristics; the primary feature distinguishing minivans from other passenger vehicles is substantial interior space. The plaintiffs, GM, Ford and Chrysler, are the only U.S. producers of minivans. Chrysler also produces minivans in Ontario, Canada; these minivans are imported into

[1] The majority consisted of a plurality of three commissioners, and a fourth, Commissioner Rohr, who authored a separate opinion. Two commissioners dissented.

the United States. The defendant-intervenors, Toyota Motor Corporation, Toyota Motor Sales, U.S.A., Inc., Mazda Motor Corporation and Mazda Motor Sales, Inc. ("Toyota" and "Mazda"), accounted for most of the minivans imported from Japan during the period of investigation.[2]

Chrysler introduced its minivans in 1983. The first Chrysler minivans, the Dodge Caravan and Plymouth Voyager, were manufactured in Canada. In 1987, Chrysler began to offer "long wheelbase" versions of its minivans. These vehicles, called the Dodge *Grand* Caravan and the Plymouth *Grand* Voyager, were produced in the United States, and had added body length between the front and rear axles. In 1989, Chrysler introduced the Town and Country minivan, which is manufactured in the United States.[3]

In late 1984, GM introduced the Chevrolet Astro and GMC Safari. The Astro/Safari minivans were built on truck frames, and as a result were less car-like in handling than the Chrysler minivans. In 1989, GM introduced "extended" Astro/Safari minivans, which had added body length behind the rear axle. In 1989, GM produced a second minivan series, consisting of the Chevrolet Lumina APV, Pontiac Trans Sport, and Oldsmobile Silhouette ("APV triplets"). The APV triplets were intended to be more passenger oriented than the Astro/Safari vans.

Ford introduced its first minivan, the Ford Aerostar, in 1985. The Aerostar, like the GM Astro/Safari, was built on a truck frame. In 1988, Ford produced an "extended" Aerostar.

The only Japanese minivans currently produced for the U.S. market are the Mazda MPV (multi-purpose vehicle) and the Toyota Previa. Neither minivan is available in an extended or long wheelbase version. The Mazda MPV was introduced in late 1988 as a 1989 model. The Toyota Previa was introduced in February 1990, as a replacement for the first minivan that Toyota introduced into the U.S. market in 1983.

B. *The Antidumping Investigation:*

On May 31, 1991, GM, Ford and Chrysler filed an antidumping petition, alleging that an industry in the United States was injured or threatened with material injury by reason of LTFV sales of Japanese minivans. On July 15, 1991, ITC notified the Department of Commerce that there was a reasonable indication of material injury to the U.S. industry producing minivans. *Minivans from Japan,* USITC Pub. 2402, Inv. No. 731–TA–522 (July 1991) (preliminary). On January 2, 1992, the Department of Commerce issued a preliminary determination, finding that Japanese minivans were sold in the United States at LTFV. *New Minivans from Japan,* 57 Fed. Reg. 43 (Dep't Comm. 1992) (preliminary determination of sales at LTFV). On May 26, the Department of Commerce published a final affirmative determination. *New Minivans from*

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[2] Mitsubishi and Nissan imported minivans into the United States during 1989 and 1990, but by 1991 these companies had effectively left the market.

[3] Chrysler also manufactures a minivan called the Mini Ram Van; the record does not clearly indicate when this vehicle was introduced.

Japan, 57 Fed. Reg. 21,937 (May 26, 1992) (final determination of sales at less than fair value).

ITC then instituted its final investigation. On June 24, 1992, ITC reached a negative determination, and on July 3, 1992, issued its opinion. The notice of final negative determination was published in the Federal Register on July 15, 1992. *Minivans from Japan*, 57 Fed. Reg. 31,388 (July 15, 1992).

C. *The ITC Determination:*

The plurality defined the like product as minivans, and the domestic industry as minivan producers. *Final Det.*, at 5, 8–12; 19 U.S.C. § 1677(4), (10) (1988).[4]

It then considered the state of the domestic industry. 19 U.S.C. § 1677(7)(C)(iii). It rejected the plaintiffs' request to consider several factors in this assessment, including the impact of lost Canadian sales on Chrysler's U.S. production, the impact of lost minivan sales on sales of other less fuel efficient vehicles, and the impact of "brand loyalty" considerations on future lost sales of other vehicles. *Final Det.*, at 7–10. It found that the industry was not mature, and that in a growing market a new minivan model expands market size without displacing existing sales. *Id.* at 17–18. It noted certain economic conditions in the domestic industry and additional factors related to product design and marketing that affected the condition of the domestic industry.[5] *Id.* at 18–20. Based on all these factors, ITC found adverse industry trends in the domestic industry, with mixed trends in 1989 and 1990 and declining trends in 1990 and 1991. *Id.* at 20–21.

The plurality then considered whether these adverse trends were caused by LTFV imports, taking into account the volume and price effect of imports and their impact on the domestic industry. *See* 19 U.S.C. § 1677(7)(B). In terms of volume, it found that the domestic industry accounted for the majority of shipments during the period of investigation; Canadian imports accounted for a minimum of twenty percent; and subject imports comprised less than fifteen percent of the market. *Final Det.*, at 22. In terms of price effects, it found domestic prices were not suppressed to a significant degree by subject imports. *Id.* at 30. It found that due to a number of factors domestic and Japanese minivans were of limited substitutability, so price was unlikely to determine vehicle choice. *Id.* at 29. The plurality also found no evidence of underselling. *Id.* at 31. It reached this conclusion after expressing reluctance to rely on certain price data, which it viewed as flawed, and, in any event, not probative due to limited substitutability. *Id.* at 30–31. It refused to place great weight on the interim data for 1992. *Id.* at 34. In conclusion, the plurality reached a negative determination, finding volume, price effect, and impact on the domestic industry insignificant. *Id.* at 36.

[4] All references to the United States Code are to the 1988 edition.

[5] One of these factors was resale of used fleet minivans. A significant percentage of domestic industry minivans are sold to rental fleets. Used fleet minivans are later reclaimed by the domestic industry and sold at discounted prices. *Final Det.* at 20. There is little competition between domestic and Japanese minivans in this sector.

Commissioner Rohr also reached a negative determination, but issued a separate opinion. He agreed with the plurality's findings concerning like product, the domestic industry, and industry trends. *Id.* at 44, 48. He found that the increased volume of subject imports had little impact on domestic sales, due to several factors: the increase was chiefly due to introduction of the Toyota Previa, which created its own demand; and only small percentages of buyers of either a domestic or imported minivan considered purchase of the other. *Id.* at 50. He also found no evidence of price depression or suppression due to LTFV imports, and like the plurality, discounted the 1992 data *Id.* at 51, 53.

Finally, neither the plurality nor Commissioner Rohr found that the evidence indicated a threat of material injury.[6] *Id.* at 37, 55–57.

II. Standard of Review

ITC's determination shall be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

III. Discussion

A. *Applicable Law:*

ITC's task is to determine whether an industry in the United States is materially injured, or threatened with material injury by reason of imports or sales at LTFV. *See* 19 U.S.C. § 1673d(b)(1). To reach a determination, ITC considers import volume, effect on domestic prices, impact on domestic producers, and other relevant economic factors. 19 U.S.C. § 1677(7)(B).

B. *Statutory Construction:*

The plaintiffs argue that ITC erred in failing to take into account the following factors: the adverse effect of lost Canadian sales on Chrysler's U.S. operations; the negative impact of lost minivan sales on U.S. producers' ability to sell less fuel efficient vehicles; and the loss of future sales of other vehicles due to brand loyalty considerations.

1. *Lost Canadian Sales:*

The plaintiffs argue that because planning, parts production, and administrative costs are shared between U.S. and Canadian operations, lost Canadian sales lead to increased per-unit costs for vehicles manufactured in the United States. They also argue that lost Canadian sales mean more intense competition between U.S. and Canadian minivans. The plaintiffs claim that ITC should have considered these factors. The plaintiffs cite statutory provisions that give ITC discretion to consider all relevant economic factors.[7] Neither the antidumping statute nor the legislative history supports the plaintiffs' position.

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[6] The plaintiffs do not challenge the negative threat determination.

[7] The plaintiffs cite two provisions. The first, 19 U.S.C. § 1677(7)(B)(ii), provides that after considering volume, price effect, and impact on the domestic industry, ITC may also consider "such other economic factors as are relevant to the determination." The second, 19 U.S.C. § 1677(7)(C)(iii), provides that ITC shall "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States."

The statute provides that ITC is to consider the impact of imports "on domestic producers of like products, *but only in the context of production operations within the United States.*" 19 U.S.C. § 1677(7)(B)(i)(III) (emphasis added). The legislative history states that foreign or offshore operations of a U.S. producer "should not be considered part of the domestic industry for injury purposes" and "are not to be considered in measuring the impact of imports on the domestic industry." S. Rep. No. 71, 100th Cong., 1st Sess. 115 (1987); H. Rep. No. 40, Part 1, 100th Cong., 1st Sess., 128 (1987). As the majority and the dissenting commissioners found, the specific instruction to disregard foreign production operations takes precedence over more general provisions granting discretion to consider all relevant factors. ITC's interpretation is consistent with the statutory language and legislative history, and will be upheld.

2. *Lost "CAFE" and Brand Loyalty Benefits:*

Under the corporate average fuel economy ("CAFE") standards of the 1975 Energy Policy and Conservation Act, as amended, 15 U.S.C. §§ 2001–2012, the government sets average fuel economy standards for passenger cars and trucks. For CAFE purposes, the minivans at issue are classified as trucks. As minivans have a fuel economy that is higher than the average requirement for trucks, the plaintiffs claim that for every minivan sale, they are able to sell another truck that is less fuel efficient. Hence, lost minivan sales result in lost CAFE benefits. The plaintiffs also argue that brand loyalty evidence demonstrates that vehicle purchasers are more likely to buy a second vehicle from the same manufacturer than from another manufacturer. They argue that lost minivan sales will result in future lost sales of other vehicles. The plaintiffs claim that ITC should have considered these factors.

The statute clearly provides that "the effect of * * * dumped imports shall be assessed in relation to the United States production of a *like product.*" 19 U.S.C. § 1677(4)(D) (emphasis added). In this case, the like product consists of minivans; lost sales of other vehicles are not to be considered. ITC's determination on this point was proper.

C. *Competition Between U.S. Minivans and LTFV Imports:*

The plurality found that price competition in the minivan industry was limited due to several factors. It reasoned that because price competition was limited, price was less likely to be a determining factor in purchasing decisions. This fact, in conjunction with the size of the dumping margin and limited import market share, led the plurality to a negative determination. For similar reasons, Commissioner Rohr also reached a negative determination.

The plaintiffs claim that the majority's findings were in error. They argue that the only trustworthy evidence in the record indicates significant competition between U.S. and Japanese minivans. In addition, they claim that the majority considered certain unreliable data and disregarded other data that demonstrates demand for LTFV imports was

price sensitive. The court will first address the plaintiffs' arguments concerning evidence that should and should not have been considered, and will then consider whether the determination is based on substantial evidence.

1. *Interim Data:*

Interim data showed sticker price increases for 1992 Toyota and Mazda minivans, a relative decline in retail sales for these minivans during the first five months of 1992, and an increase in U.S. retail sales for the same period. *See* Conf. Doc. 46I, INV–P–104. The plaintiffs assert that the data prove the importance of price to market share.

The majority refused to place great weight on the interim information because it did not distinguish between Chrysler's U.S. and Canadian minivans, and it was neither complete nor comparable to data collected during the period of investigation. In addition, the commissioners expressed reluctance to draw conclusions about a full year based on interim data, particularly in the minivan industry where quarterly sales could be influenced by many factors. The plurality also found that, even if it were to consider the data, there was insufficient evidence in the record to conclude that an increase in U.S. minivan sales was related to price increases in LTFV imports.

ITC did not act unreasonably. The questionnaires, which sought data to the end of the 1991 calendar year, were sent out in early 1992, with a return date of March 27, 1992. The parties were given an adequate opportunity to comment on the questionnaires in early 1992; although the plaintiffs filed comments at that time, they did not seek collection of data beyond 1991. It was not until their prehearing brief, filed May 14, 1992, just one week prior to the hearing date and five weeks prior to the Commission's vote, that they first raised arguments concerning the 1992 data. Given the lateness of the plaintiffs' allegations, ITC's decision not to conduct a supplemental investigation was reasonable.[8] *See Florex v. United States,* 13 CIT 28, 37, 705 F. Supp. 582, 591 (1989) (not unreasonable for ITC to reject data submitted after due date for questionnaire responses, when data would have required supplemental mailing).

Of course, ITC bears the burden of collecting all data necessary to its investigation, and the fact that the plaintiffs did not make a specific and seasonable request is not dispositive. *See USX Corp. v. United States,* 11 CIT 82, 96, 655 F. Supp. 487, 499 (1987). Here, however, the majority found the information unreliable; on this basis, it had discretion as the trier of fact to discount it. *Wieland Werke, AG v. United States,* 13 CIT 561, 576, 718 F. Supp. 50, 61–62 (1989); *see also Iwatsu Elec. Co. v. United States,* 15 CIT 44, 56, 758 F. Supp. 1506, 1517 (1991). Its decision was not unreasonable. The data consisted of retail sales information only; the absence of evidence concerning other factors that might have

[8] Notably, in the preliminary determination, ITC reminded the parties that due to statutory deadlines, it had to decide on the data to be gathered in the questionnaires prior to the hearing date and submission of prehearing briefs. *Minivans from Japan,* USITC Pub. 2402, Inv. No. 731–TA–522, at 16–17 n.49 (July 1991) (preliminary).

influenced minivan sales rendered the data incomplete. In other respects, the data were not comparable to those covering the period of investigation, in part because retail prices were used whereas the questionnaire responses contained wholesale price information. In addition, the data did not distinguish between Chrysler's Canadian and U.S. minivans, and Canadian shipments had a demonstrated effect on the data throughout the investigation. Finally, the majority permissibly discounted the information because it covered less than an annual period, and sales were subject to short term fluctuations. *See, e.g., British Steel Corp. v. United States*, 8 CIT 86, 93–94, 593 F. Supp. 405, 410–11 (1984) (rejecting argument that ITC is obligated to consider quarterly analysis of most recent data).

The plaintiffs argue the merits of the 1992 data at some length. These arguments need not be addressed as the court upholds the decision to discount the data. In any event, the court notes that the plurality correctly concluded no evidence linked the claimed increases in domestic sales to import pricing, and that the gains could easily have been due to other factors.

2. *Toyota Data:*

The majority examined "cross-shopping" and "second-choice" data; these data indicate the various minivans that purchasers inspected before making their selections and the minivans they would have purchased had their first choices not been available. The plurality considered all these data, but gave greater weight to Toyota's Consolidated Dynamic Study ("CDS"), which consisted of second-choice information. Several reasons were given for placing greater reliance on the CDS information: it did not confuse Chrysler's U.S. and Canadian minivans; it included complete data, to which ITC typically gives greater weight; and the plaintiffs indicated they did not object to it. Although Commissioner Rohr did not cite the Toyota data specifically, he states that he considered all the second-choice data. The plaintiffs challenge the Toyota data on several grounds.

First, the plaintiffs argue that the data were submitted in Toyota's post-hearing brief, and they had no opportunity to respond. ITC counters that the plaintiffs had adequate response time, and are estopped from challenging the data. The court agrees with ITC.

In both the preliminary and final investigations, ITC requested surveys or studies regarding consumer preferences for minivans. ITC requested complete copies of the survey information. Following the May 21, 1992 hearing, one commissioner requested cross-shopping data that distinguished between U.S. and Canadian minivans. The plaintiffs and Mazda were unable to comply as their surveys did not permit such a distinction. Toyota, on the other hand, attempted to eliminate the Canadian information from its tables. The resulting CDS data, which was filed with Toyota's post-hearing brief on May 29, 1992, showed that only

modest percentages of import buyers listed a domestic vehicle as their second choice.[9]

On June 5, 1992, the plaintiffs filed a letter responding to certain unrelated allegations made by Mazda and Toyota on May 28, 1992.[10] Conf. Doc. 40. At that time, the plaintiffs did not raise any arguments concerning the CDS data. On June 19, 1992, three weeks after post-hearing briefs were filed, the plaintiffs attempted to file a letter, ostensibly regarding the CDS data; the comments were returned as untimely.[11]

Certainly, there is some asymmetry in that the plaintiffs were not given a specific opportunity to respond to information requested at the hearing and submitted in a post-hearing brief. *See Suramerica de Aleaciones Laminadas v. United States*, 14 CIT 366, 370 (1990). There is also some danger that information accepted by ITC and not subject to rebuttal may be erroneous. *Id.* Nevertheless, as the plaintiffs have pointed out, material injury investigations are not adversarial in a formal sense, and it is ultimately ITC's responsibility to evaluate the data it gathers. Conf. Doc. 40, at 2. Moreover, it is ITC's prerogative to set and enforce time limits for submission of data. *See, e.g., Avesta AB v. United States*, 12 CIT 493, 510–11, 689 F. Supp. 1173, 1188 (1988). The notice of investigation provided that written submissions were to be filed by May 29, 1992; no provision was made for rebuttals. *Minivans from Japan*, 57 Fed. Reg. 2785, 2786 (ITC 1992) (institution and scheduling of final antidumping investigation); *see* 19 C.F.R. § 207.24 (1992). While ITC did accept a submission from the plaintiffs one week after the deadline, it did not act unreasonably in refusing a submission filed three weeks after the deadline and just three working days before the Commission's vote, especially since the plaintiffs' challenge is not so extensive as to justify the delay. Accordingly, the plaintiffs' first argument that they had no opportunity to respond to the submission is without merit.

The plaintiffs' second argument is that the data are misleading and unreliable. Specifically, the plaintiffs claim that the data depend on the impossible premise that consumers can distinguish with precision between Chrysler models manufactured in Canada (Dodge Caravan/Plymouth Voyager) and those manufactured in the United States (Dodge Grand Caravan/Plymouth Grand Voyager). They argue that it is unreasonable to expect consumers to recall and report vehicle designations accurately. The plaintiffs also argue that the figures reported in the CDS data are inherently incredible, because they indicate that the Dodge Grand Caravan and Plymouth Grand Voyager, which account for a significant market share, do not compete in any material way with either domestic or imported minivans.

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[9] Toyota also disclosed a number of limitations with the data. Specifically, Toyota explained that the data were derived from survey information, in which consumers are asked to specify the model of their second choice. Some of the survey forms included incomplete responses. Conf. Doc. 36, Response to Commissioner Nuzum Question 1, at 5 n.3.

[10] In their May 28, 1992 letter, Mazda and Toyota asked ITC to strike plaintiffs' cross-shopping and second-choice evidence on the grounds that complete data were not provided.

[11] In fact, after the June 5 submission and one other on June 8, ITC returned all submissions, including documents from the plaintiffs and Toyota.

To a degree, the plaintiffs' arguments have merit. Certainly, all consumers may not have been able to recall the model names of Chrysler vehicles. Nevertheless, the majority did not err in relying on the data. The choice was between two sets of imperfect data, one set that included Canadian imports, the other that excluded them, perhaps imperfectly. Moreover, the data do not seem absurd on their face. The plaintiffs' arguments are relevant only to the Chrysler vehicles. Yet, the figures show that purchasers of Japanese minivans express a similar low level of second choice preference for other domestic minivans, including GM vans, which also hold significant market share. The plaintiffs now argue that ITC would have reached a more reasonable conclusion by eliminating Canadian vehicles based on relative sales. The plaintiffs did not suggest this methodology to ITC, and cannot now complain that ITC did not adopt it.

The plaintiffs make two additional arguments. They claim that the plurality's remaining justifications for relying on the Toyota data – that only Toyota submitted complete data, and that the plaintiffs conceded ITC could place greater weight on the data – are incorrect. As to the first point, it is the plaintiffs who are incorrect. Toyota did submit complete raw survey data, Conf. Doc. 45 (M–P), whereas the plaintiffs, by their own admission, submitted only summaries. Conf. Doc. 40, 4–5.[12] As to the second point, it appears that the plaintiffs' statement that they would not object if ITC relied more heavily on the Toyota data (which essentially contained the same cross-shopping figures as the GM data), was a reference to the Toyota data prior to exclusion of Canadian imports. So, in fact, the plaintiffs made no concessions concerning the CDS data. Even without this justification, however, the reasons for relying on the CDS data were sufficient. Finally, the majority did not disregard other data in the record, but emphasized that it considered all the survey data. There was no error. The court will now consider whether the determination was based on substantial evidence.

3. *Price Effects:*

In evaluating the effect of imports on domestic prices, ITC considers whether "there has been significant price underselling by the imported merchandise," and whether "the effect of imports * * * otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii).

Here, the plurality found no evidence of price depression because prices were rising. It also found no evidence of significant underselling, primarily because it believed the data to be flawed and unreliable. In terms of price suppression, it noted several relevant factors, such as the degree of substitutability between minivans, the availability of substi-

[12] The plaintiffs claim that if the summaries were inadequate, ITC could have requested additional information. The questionnaire clearly seeks submission of complete survey data. ITC is not obligated to reiterate clear instructions with which a producer has not complied.

tute vehicles (fairly traded imports, resale minivans, and non-minivan substitutes), the size of the dumping margin, and the market share held by imports. *Final Det.*, at 24.

It found that the presence of substitutes for domestic and Japanese minivans limits price suppression. It found that the size of the dumping margin also limits the impact of dumping on domestic sales, and that given the size of the margin, demand would not have increased significantly even if the subject imports had been fairly traded.[13] It noted that Japanese imports had only a limited market share, and thus any decrease in import market share would not have a significant impact on domestic sales. *Id.* at 29.

On the question of substitutability, the plurality, relying on basic economic principles, noted that the more fungible the product, the more likely that purchasers will make decisions based on price differences. On the other hand, when products are highly differentiated, price is less likely to determine product selection. It found that minivans are highly differentiated, and numerous factors limit their substitutability, including vehicle features, perceptions of quality and reliability, price differences, and brand loyalty considerations. *Id.* at 24–27. Commissioner Rohr also found that competition in the minivan industry was more a matter of features than price. *Id.* at 51. These findings will be discussed in turn.

(a) Vehicle Features:

The plurality found that minivans are differentiated by many features, including interior space, seating configuration, cargo capacity, handling, engine size, front- or rear-wheel drive, two or four-wheel drive, length or wheelbase, available options, and safety features.[14]

As a general matter, the plaintiffs argue that the feature differences identified by the plurality do not limit competition between U.S. and Japanese minivans to any significant degree. They concede that these differences exist and influence purchasing decisions, but argue that competition takes place across differences. They claim that for each of the two Japanese models, one or more U.S. made minivans is a closer match in terms of features and characteristics than the other Japanese model. The plaintiffs misconstrue the plurality's reasoning in a fundamental way. The plurality did not draw systematic distinctions between U.S. and Japanese minivans. It found that there are differences between *all* minivans in terms of features and characteristics, which limit their interchangeability. As a result, minivans compete based on non price factors; to a much lesser extent, they compete based on price or deal offered. This particular finding, which was central to the determination,

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[13] The weighted average dumping margin was 9.72 percent; Toyota Previas were found to be sold at 6.41 percent less than their fair value, and Mazda MPVs were found to be sold at 12.7 percent less than their fair value.

[14] The Previa and MPV have several distinguishing characteristics. The Previa comes with a four cylinder engine; the MPV is available with four or six cylinders. All domestic minivans come with a six cylinder engine. Neither the Previa nor the MPV has front-wheel drive, a feature that is available in many domestic minivans. The MPV has limited interior space; the Previa is much roomier.

is also supported by survey evidence.[15] The evidence indicates that most minivan purchasers considered as many as five other factors before price; for purchasers of Japanese minivans, price was an even less important consideration.[16] Conf. Doc. 43A, at 6–7.

In addition to their broad objection, the plaintiffs challenge specific findings concerning wheelbase and engine size. On the subject of wheelbase, the plurality stated:

> All shipments of Japanese minivans were of standard length while U.S. minivans were more evenly split between standard length and extended length wheel bases.

Final Det., at 25. The plaintiffs claim that the plurality misinterpreted the data. They point out that only Chrysler makes a minivan with two different *wheelbases*, but GM and Ford sell their vehicles in regular and extended *lengths*. In addition, the plaintiffs note that Japanese minivans are not of :"standard" length; the Previa is a relatively long minivan with significant cargo capacity, whereas the MPV is a much smaller vehicle in terms of length and cargo capacity. According to the plaintiffs, the Previa is comparable to Chrysler's U.S.-built long wheelbase vehicles or the extended length Ford Aerostar, whereas the MPV is comparable to the regular length domestic minivans or the Canadian-built Chrysler minivans. Hence, argue the plaintiffs, even if the plurality intended "wheelbase" as a surrogate for "size," neither length nor cargo capacity distinguishes U.S. from Japanese minivans.

This argument is without merit. During the investigation, ITC used two minivan categories: "Type wheelbase: standard length," and "Type wheelbase: extended length." *See, e.g.*, Conf. Doc. 46I, at B–72–B–73. All long versions – both extended length and long wheelbase – were placed under the second category. Hence, ITC's designation of "extended length wheel base" refers to both long wheelbase and extended length minivans. Moreover, the fact that no systematic distinctions exist between U.S. and Japanese minivans based on length and cargo capacity is not relevant. The mere availability of an extended length or long wheelbase vehicle, combined with other differences, is a valid basis for product differentiation, which limits substitutability.[17]

As for engine size, the plurality noted:

> Many Japanese minivans are sold with only 4–cylinder engines [referring to the Previa],[18] while all U.S. minivans sold in 1991 had the

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[15] An inference of limited substitutability may be drawn from evidence of product differentiation. In addition, the cross-shopping and second-choice data, discussed *infra*, are also evidence of limited substitutability.

[16] The plaintiffs also argue that when a producer captures an advantage in terms of vehicle characteristics, competitors neutralize the advantage through pricing. As support for this proposition, the plaintiffs rely on the interim data, which the court has already found was properly discounted. They also rely on certain statements made at the Commission's hearing, where Toyota and Mazda witnesses testified that price may affect sales. Although the evidence shows that price or value for money is a consideration for all minivan purchasers, due to product differentiation and perceived quality differences, factors other than price are the primary determinants of vehicle choice.

[17] At oral argument, the plaintiffs spoke uncharitably of the plurality's finding that differentiation was based on wheelbase. If wheelbase were the only difference between minivans, perhaps the plaintiffs would have a point. Clearly, however, there are numerous differences among minivans that limit substitutability.

[18] The Mazda MPV comes with a four- or six-cylinder engine, so cylinder count is not an issue with this vehicle.

larger engine size. The smaller engine size has been cited as a drawback to some of the Japanese vehicles.

Final Det., at 25. For this proposition, the plurality relied on an ITC memorandum, which in turn cited an article in the trade press. In a road test comparison of six minivans, the article described as a "drawback" Previa's "2.4 liter, 16–valve inline four cylinder engine," and noted that its "138 horsepower was noticeably overmatched in this field of V–6s." Rik Paul, *The Great Mini-Van Comparison*, Motor Trend, at 94 (May 1992), Pub. Doc. 337 (56). The article then goes on to compliment the Previa's performance, in spite of its "valiant but overmatched" 2.4 liter engine. The plaintiffs claim that the critical issue is not cylinder count, but overall engine performance including horsepower and torque ratings. When these factors are considered, according to the plaintiffs, the trade press has compared the Previa favorably to six-cylinder vehicles. Here, the plaintiffs attempt to prove too much. The plurality stated only that the Previa's four-cylinder engine has been cited as a drawback; substantial evidence supports this proposition. That this report, or others, praise the Previa after pointing out that it has a four-cylinder engine does not undermine the point that the trade press perceives a difference based on cylinder count, which is relayed to consumers. After all, product differentiation may be based on actual or perceived differences.[19]

Other than wheelbase and engine size, the plaintiffs do not challenge the plurality's specific findings on vehicle features. The findings are sound. Although all minivans share certain very basic characteristics, there are many differences that fragment the market in various ways.[20]

(b) Perceptions of Quality and Reliability:

The plurality also found that perceptions of quality and reliability are important nonprice considerations influencing vehicle selection. *Final Det.*, at–26. Indeed, the staff report states that the quality of products and dealership service are critical elements of the auto industry. Conf. Doc. 46I, at A–26. Survey evidence also indicates that quality and reliability are among the most important considerations for buyers. Conf. Doc. 43A, at 6.

The plurality found that in general Japanese minivans are viewed as higher quality than domestic minivans. *Final Det.*, at 26. Substantial evidence in the form of warranty data and quality survey data supports

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[19] As a GM witness testified, the "trick" in the automobile industry is "to find a way of reaching different sets of customers with products that are perceived to be different." Pub. Doc. 274, at 129. These differences may be real or imagined. For example, although there was evidence that the APV Triplets (GM Silhouette, Lumina and Trans Sport) were substantially similar vehicles, according to the GM witness, GM had successfully marketed the vehicles in different market segments. *See id.*, at 128–30.

[20] The plaintiffs mount the same, equally unsuccessful, attack on Commissioner Rohr's opinion. In discussing volume effects, Commissioner Rohr found that the "four-cylinder, short wheelbase" Previa competes principally with Canadian minivans, rather than domestic vehicles. *Final Det.*, at 50. There was evidence in the record to indicate that the Previa was at a disadvantage relative to U.S.-built vehicles, at least in terms of cylinder count. Since Canadian-built Chrysler vehicles are available with four-cylinders, the Previa does not have the same disadvantage relative to these vehicles.

this finding.[21] Conf. Doc. 46I, at A–26–A–31. The plaintiffs do not put up a serious fight on this front, except to point to some less persuasive evidence in the record which they claim the plurality ignored.

(c) Price Differential:

The plurality found a significant price differential between domestic and imported minivans, which also limits substitutability. *Final Det.*, at 27. It found that Japanese minivans were generally sold at higher prices, and to a greater extent in higher price ranges than the domestic vehicles.[22] *Id.* It found that this factor limits substitutability to the degree that purchasers are constrained by income considerations, but noted that price was a less important criteria for buyers of Japanese minivans than for domestic purchasers. *Id.* at 27–28. Substantial evidence, including the plaintiffs' own concessions, supports the plurality's findings. Conf. Doc. 46I, at A–151; Conf. Doc. 23, at 29; Conf. Doc. 43A, at 6–7. The evidence shows that Japanese minivans compete in the higher price ranges, and that price is less important to purchasers of these vehicles.[23] Again, this evidence indicates that the market is fragmented into smaller markets. Finally, the plaintiffs' argument that reliance on average prices distorts the data on the price differential is without merit. ITC is not prohibited from relying on averages. *See generally, Copperweld Corp. v. United States,* 12 CIT 148, 162, 682 F. Supp. 552, 566 (1988) (neither statute nor legislative history requires ITC to adopt any particular analysis when market consists of different segments).

(d) Brand Loyalty:

The plurality also found that brand loyalty is an important nonprice factor that affects consumer preferences and limits substitutability. *Final Det.*, at 26. That is, the first purchase of any type of vehicle tends to dictate future vehicle selection. The cross-shopping and second-choice data measure brand loyalty to an extent. The plurality found these data indicate that only a minority of minivan buyers "shop" both a U.S. and Japanese minivan. *Id.* at 27. Commissioner Rohr also found limited cross-shopping. *Id.* at 50.

The significance of the cross-shopping and second-choice data is disputed, and each side claims victory based upon it. The majority considered all the data. The cross-shopping data support the finding that relatively few purchasers consider purchase of both domestic and import brands. Focusing on what are agreed to be the more relevant second-choice data, that is, the percentage of Japanese-import purchasers listing a domestic vehicle as their second choice, and relying on the Toyota CDS data, which ITC reasonably found more reliable, the evidence also indicates that a relatively small percentage of the market

[21] Additional evidence supporting the plurality's finding is survey data that indicates purchasers of the MPV and Previa ranked quality and reliability as more important reasons for purchase than U.S. minivan purchasers, suggesting that the Japanese vehicles are perceived to be of higher quality. For purchasers of Japanese minivans, price was a less important consideration than for domestic purchasers.

[22] ITC was aware that there was some overlap.

[23] The evidence also indicates that a primary reason for rejecting the Japanese minivans was high price.

would even consider purchase of a domestic vehicle if the import were not available.

That is not the end of the inquiry, however, because the plaintiffs maintain that the data demonstrate significant competition between domestic and Japanese minivans. The data do indeed indicate that competition occurs between U.S. and Japanese minivans, although the court would not characterize it as significant. The majority did not find otherwise. The data also do not indicate the basis of any competition that does exist. That is, if competition takes place primarily based on nonprice factors, the majority's findings concerning price suppression are correct. Moreover, as the defendant and the defendant-intervenors point out, the second-choice data are not to be equated with lost sale information. The data indicate only the *possibility* that a purchaser would have settled for another vehicle, had his or her first choice not been available.

(e) Underselling:

On the issue of underselling, which requires more specific information than assessments of price differentials for different vehicle categories, the plurality refused to place great weight on the pricing data because selection of comparable vehicles was difficult. In addition, it rejected the validity of certain proposed price comparisons, such as between "regular length" Japanese minivans and "extended-length" U.S. vehicles. The plaintiffs concede that price comparisons are difficult; however, they restate their previous objection to the characterization of Japanese minivans as "regular length." This issue has already been discussed. Suffice it to say that differences between minivans, including wheelbase or length, made specific price comparisons unreliable. The plurality was correct in regarding such comparisons with skepticism.

4. *Volume Effects:*

The plaintiffs acknowledge that the majority's substitutability finding was also the basis of its conclusions concerning the effect of import volume. They argue, however, that the analysis is flawed on independent grounds.

On the issue of volume, ITC is to consider whether volume or increase in volume is significant, either in absolute terms or relative to U.S. production or consumption. 19 U.S.C. § 1677(7)(C)(i). The plurality found that it was not significant. It noted that increased volume was due to introduction of the Previa, which, in large part, created its own demand.[24] It noted that throughout the period of investigation the market share of LTFV imports in terms of quantity and value was less than fifteen percent. It also stated that its finding concerning the significance of volume

[24] This finding was supported by substantial evidence. The record showed that 1989 shipments from Japan, which consisted almost entirely of the MPV, doubled in 1990, the year in which the Previa was introduced. In that year, there was also a significant increase in U.S. consumption, although it was less significant than the increase in Japanese shipments. Conf. Doc. 46I, at A–55, A–13s–38. In addition, the plaintiffs conceded the general proposition that introduction of new minivan models can lead to market expansion. *See* Conf. Doc. 45Y(3), at 78d; Conf. Doc. 45Y(4), at 274; Pub. Doc. 317A, at 4–5.

increases was made in view of nonprice factors, such as the level of substitutability. Commissioner Rohr's findings concerning volume were based on a similar analysis.

The plaintiffs argue that the increased volume of LTFV imports had a significant impact because the minivan industry is capital intensive, and small changes in sales volume lead to steep profit losses. In addition, they argue that sales of LTFV imports were at the high end of the market, which is more profitable to U.S. producers. There is no authority for the proposition that these factors, above all others, should dictate a result. ITC has discretion to consider import volume in light of the "conditions of trade, competition, and development regarding the industry concerned." S. Rep. No. 249, 96th Cong., 1st Sess. 88. As this court has recognized, the significance of import volume may depend on whether the product is fungible and price sensitive, or whether the market is highly differentiated. *See Negev Phosphates, Ltd. v. U.S. Dep't of Commerce,* 12 CIT 1074, 1084, 699 F. Supp. 938, 947 (1988) (import volume alone cannot gauge effect of imports because if product is price sensitive, underselling of even small volumes may cause price suppression); H.R. Rep. 317, 96th Cong., 1st Sess. 46 (1979) (small volume of imports may or may not have significant impact, depending on industry). Here, the majority's finding on import volume was dependent on its finding of limited substitutability, and the plaintiffs have not identified any independent error. Its reasoning was legally sound.

D. *Other Arguments:*

The plaintiffs argue that the plurality failed to state the standard of causation and weighed various causes. They claim there is evidence an incorrect standard was applied. This argument is without merit. The plurality's analysis clearly tracks the statutory factors, and there is no indication that the plurality weighed causes.

The plaintiffs also argue that the plurality attributed to other factors injury that was actually caused by the LTFV imports, and overlooked the fact that U.S. producer fleet sales, which are less profitable, were required because of competition from LTFV imports. These arguments are legally insufficient. ITC found no nexus between LTFV imports and injury to the domestic industry. It did not err in noting other possible causes of injury, S. Rep. No. 249, 96th Cong., 1st Sess., at 75; nor was there sufficient evidence to indicate that fleet sales were necessitated by the subject imports.

IV. Conclusion

The plaintiffs have failed to demonstrate legal error in ITC's determination. In addition, the negative determination was supported by substantial evidence, in that the volume and market share of the subject imports were low, price depression was absent, and no price suppression or underselling was found, based, in part, on low substitutability. In addition, limited substitutability also led to a finding that the volume and market share which did exist were not significant. The vehicle largely

responsible for increased import market share, the Previa, created a good part of its own demand. Purchasers of Japanese minivans did not usually consider domestic minivans, and prospective purchasers not satisfied with Japanese minivans had other imports from which to choose, as well as nonsubject merchandise, such as station wagons. Thus, the majority's findings, that competition between Japanese and domestic minivans was limited and impact on the domestic industry was insignificant, are supported. The factors to which the plaintiffs point as demonstrating injury do not amount to evidence of a significant contribution by the subject merchandise to material injury, and are insufficient to undermine the substantial evidence on which the ITC majority relied. The determination is sustained.

(Slip Op. 93–129)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00577

Plaintiffs move pursuant to Rule 56.1 of the Rules of this Court for partial judgment on the agency record as to Counts I, II, IV, VII, X, XI, XIII and XVII of their complaint claiming that the Department of Commerce, International Trade Administration ("Commerce" or "ITA"), (1) failed to correct errors in its determination which lead to tainted proceedings and unfairly high and inaccurate antidumping margins; (2) incorrectly calculated the variable costs of manufacturing merchandise sold in the home market due to an error in its program; (3) incorrectly rejected NTN's actual costs of production in favor of other "best information available"; (4) incorrectly included a theoretical amount for idled machinery not used in production and an amount representing NTN's loss on the disposal of fixed assets; (5) erroneously calculated margins on several sales to one purchase price customer twice due to the use of both an original and a revised tape; and (6) failed to publish an amended final determination excluding incorrect data.

Held: Plaintiffs' motion is granted in part and denied in part and this case is remanded to Commerce to (1) recalculate NTN's variable costs of manufacture by merging the variable costs of manufacture for only home market bearing families; (2) recalculate NTN's cost of production and constructed value without resorting to best information available; and (3) recalculate NTN's dumping margins to account for the 46 sales at issue only once. Plaintiffs' motion is denied in all other respects.

[Plaintiffs' motion for partial judgment on the agency record is denied in part and granted in part, and this case is remanded to the ITA.]

(Dated July 13, 1993)

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune V. Kano and *Diane A. MacDonald)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of

counsel: *Stephen J. Claeys,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, John M. Breen and *Margaret E.O. Edozien)* for defendant-intervenor The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Larry Hampel and *Joseph A. Perna, V)* for defendant-intervenor Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corp. and NTN Corporation ("NTN"), move pursuant to Rule 56.1 of the Rules of this Court for partial judgment on the agency record as to Counts I, II, IV, VII, X, XI, XIII and XVII of their complaint claiming that the Department of Commerce, International Trade Administration ("Commerce" or "ITA"), (1) failed to correct errors in its determination which lead to tainted proceedings and unfairly high and inaccurate antidumping margins; (2) incorrectly calculated the variable costs of manufacturing merchandise sold in the home market due to an error in its program; (3) incorrectly rejected NTN's actual costs of production in favor of other "best information available"; (4) incorrectly included a theoretical amount for idled machinery not used in production and an amount representing NTN's loss on the disposal of fixed assets; (5) erroneously calculated margins on several sales to one purchase price customer twice due to the use of both an original and a revised tape; and (6) failed to publish an amended final determination.

The administrative determination under review is the ITA's final results in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews ("Final Results"),* 56 Fed. Reg. 31,754 (1991). Substantive issues raised by NTN in the underlying administrative proceeding were addressed by the ITA in the Issues Appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review ("Issues Appendix"),* 56 Fed. Reg. 31,692 (1991).

BACKGROUND

On June 11, 1990, the ITA initiated an administrative review of ball bearings, cylindrical roller bearings, spherical plain bearings and parts thereof from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990). NTN participated in this review. *Id.*

On March 15, 1991, the ITA published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial*

Termination of Antidumping Duty Administrative Reviews, 56 Fed. Reg. 11,186 (1991).

On July 11, 1991, the ITA published its Final Results in this proceeding. *Final Results,* 56 Fed. Reg. at 31,754.

DISCUSSION

In reviewing a final determination of Commerce, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

1. *Clerical Errors* (Counts I and II):

First, NTN claims that Commerce committed various clerical errors. In its questionnaire for this review, issued on June 1, 1990 (Section A) and July 17, 1990 (Sections B-E), Commerce requested that respondents classify bearings based on certain criteria, including precision rating, into families. In its response to section B, NTN identified many different families and supplied a list of U.S. sales. On March 15, 1991, Commerce published its preliminary results and on April 11, 1991 NTN submitted its case brief detailing its comments to the preliminary results. NTN contends that at this stage it had "discovered two instances in the U.S. sales database for ball bearings (ESP transactions) which required a further explanation or a correction of information already on the record." *Plaintiffs' Motion for Partial Judgment on the Agency Record ("Plaintiffs' Motion")* at 11.

Specifically, NTN claims that the family code for five part numbers sold to the same U.S. customer incorrectly showed them to meet high precision bearing tolerances, rather than the standard precision bearing tolerances. NTN claims that this alleged error caused an inaccurate price differential and larger dumping margins.

The second alleged clerical error identified by NTN on April 11, 1991, involved four transactions which were reported as sales for U.S. consumption in NTN's response. NTN now asserts that these sales were made to a Canadian customer.

According to 19 U.S.C. § 1675(f) (1988 & Supp. 1993), Commerce is afforded the discretion to correct clerical errors in final determinations "within a reasonable time after the determinations are issued." Commerce has promulgated a regulation which sets time limits on the

submission of factual information in administrative reviews. The regulation states in pertinent part:

§ 353.31 Submission of factual information.

(a) *Time limits in general.* (1) Except as provided in paragraphs (a)(2) and (b) of this section, submissions of factual information for the Secretary's consideration shall be submitted not later than:

(i) For the Secretary's final determination, seven days before the scheduled date on which the verification is to commence;

(ii) For the Secretary's final results of an administrative review under § 353.22 (c) or (f), the earlier of the date of publication of notice of preliminary results of review or 180 days after the date of publication of notice of initiation of the review; * * *

* * * * * * *

(2) Any interested party * * * may submit factual information to rebut, clarify, or correct factual information submitted by an interested party * * * at any time prior to the deadline provided in this section for submission of such factual information or, if later, 10 days after the date such factual information is served on the interested party * * *.

(3) The Secretary will not consider in the final determination or the final results, or retain in the record of the proceeding, any factual information submitted after the applicable time limit. * * *

19 C.F.R. § 353.31(a) (1991).

The preliminary results were published on March 15, 1991, while the 180–day period after initiation of review ended April 11, 1991. Therefore, according to the statute, any information provided after March 15, 1991 will be considered untimely and under § 353.31(a)(3), the Secretary need not accept it when making the final determination. In this case, the "new" information was submitted by NTN in its brief dated April 11, 1991 and is thus indisputably untimely.

Commerce "is not required to correct a respondent's errors when a respondent reported erroneous data but failed to timely correct it." *See NSK Ltd. v. United States ("NSK I"),* 17 CIT ____, Slip Op. 93–110 at 6 (June 17, 1993); *see also NSK Ltd. v. United States ("NSK II"),* 16 CIT ____, ____, 798 F. Supp. 721, 725 (1992), *aff'd,* No. 93–1060 (Fed. Cir. May 18, 1993); *Sugiyama Chain Co. v. United States,* 16 CIT ____, ____, 797 F. Supp. 989, 996 (1992). To do this would put an undue burden upon Commerce "and litigants might tend to become slovenly with submitted data." *Sugiyama,* 16 CIT at ____, 797 F. Supp. at 995.

It is "the respondent's obligation to supply Commerce with correct information." *See NSK I,* 17 CIT at ____, Slip Op. 93–110 at 7; *see also Chinsung Indus. Co. v. United States,* 13 CIT 103, 106, 705 F. Supp. 598, 601 (1989). If, however, a clerical error is "so egregious and so obvious that the failure to correct it was an abuse of discretion and undermined the interests of justice, the Court may remand the case to the ITA for adjustment of the calculations." *Tehnoimportexport v. United States,* 15 CIT ____, ____, 766 F. Supp. 1169, 1178 (1991). Furthermore, "an er-

ror in original information submitted by a respondent must be obvious from the administrative record in existence at the time the error is brought to the ITA's attention." *NSK II,* 16 CIT at ____, 798 F. Supp. at 725.

In *NSK II,* NSK similarly alleged a clerical error and in its pre-hearing brief NSK provided new information on the production process for the roller bearings at issue, as well as corrected cost of production information, in an attempt to convince Commerce to correct the alleged error. *Id.* at ____, 798 F. Supp. at 721.

In that case, the Court stated that the "submission of detailed factual information at the pre-hearing brief stage of an administrative review is clearly untimely under any circumstances." *Id.* at ____, 798 F. Supp. at 725.

In the case at hand, the primary issue is whether the information in question is new information or was on the administrative record beforehand. NTN has placed much emphasis on the assertion that the "new" information is in fact corrections of clerical errors and statistical mistakes of original, timely submitted data, provided in response to ITA questionnaires.

To support its contention for its first alleged error, NTN attached to its case brief on April 11 as Exhibit C, an affidavit of Mr. Akira Kinoshita, Vice-President of Engineering for NTN Bearing Corporation of America ("NBCA"), as well as engineering drawings prepared by the customer of the bearings. Doc. (Conf.) 288 at Exhibit C. These additions to the record on April 11 are clearly new information and thus untimely submitted.

To support its second contention, NTN claims that Commerce had information indicating such already on the record stating that NTN had submitted its customer list to Commerce as Exhibit 15 to its section B response. *Memorandum of Torrington Company in Opposition to Plaintiffs' Motion for Partial Judgment on the Agency Record,* Appendix 19. Plaintiff claims that this customer list for the four transactions in question showed a customer code for a customer located outside the United States. Upon evaluation of this list, it is not obvious that the customer code was for a customer located outside the United States. In addition, NTN attached to its April 11 brief an affidavit of Mr. Naokazu Iyama, Vice-President of NBCA attesting that these sales were not made to United States customers. Doc. (Conf.) 288 at Exhibit D. The affidavit also included attached copies of the invoices and bills of lading for the four transactions involved. NTN now asks this Court to remand this case back to Commerce for correction of these alleged clerical errors.

After a review of the record, this Court concludes that the information in question was in fact new information, and furthermore, NTN has not shown the error to be *obvious,* nor *egregious.* Thus, Commerce need not have incorporated the newly provided data into its calculations.

Plaintiffs alternatively claim that since a remand has already been conceded to on two counts by Commerce, then it serves justice to re-

mand "all errors," despite fault, to achieve the most accurate margins. *See NTN's Reply to the Responses of Defendant and Defendant-Intervenors to NTN's Motion for Partial Judgment on the Agency Record* at 22. In support of this assertion NTN cites *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 12 CIT 825, 696 F. Supp. 665 (1988), where this court allowed a remand under similar circumstances. Last year, however, the court in *Sugiyama*, 16 CIT at ____, 797 F. Supp. at 989, distinguished that a remand on the grounds that the errors in that case appeared to be inadvertent clerical or transcription errors, not errors in submission caused by incorrect formula calculations or other non-obvious substantive errors. That court noted:

> One might parry that because Commerce is to make other adjustments on another portion of a remand on this case, why not let them take care of these corrections in the interests of overall accuracy. If the Court were to adopt such a general policy, Commerce would be unnecessarily overburdened and litigants might tend to become slovenly with submitted data. Furthermore, it is not inconceivable that others might find convenient ways to unfairly manipulate data to skew the outcome of results.

Id. at ____, 797 F. Supp. at 995.

The facts in this case indicate that the errors were likewise of a more substantive nature and that they were anything but obvious. As in *Sugiyama*, these errors also do not merit an overall remand just because a remand may be conceded on other points. Therefore, plaintiffs' motion to remand this case for correction of clerical errors alleged in Counts I and II of its complaint is denied.

2. *Variable Costs of Manufacturing* (Count IV):

NTN claims that Commerce erred in merging NTN's weighted average home market family variable costs of manufacture. Upon reexamination of the administrative record, Commerce agrees that it should not have merged variable costs of manufacture for both bearing families and specific models. Therefore, this case is remanded to Commerce for recalculation of NTN's variable costs of manufacture by merging the variable costs of manufacture for only home market bearing families.

3. *Best Information Available* (Count VII):

NTN also claims that Commerce's use of "best information available" ("BIA") in place of using NTN's actual costs of production was unreasonable and not supported by substantial evidence.

In this case, the only submissions provided by NTN that were discarded in favor of BIA statistics were for ball bearings. Commerce claims that this was done because, upon verification, NTN revealed that a "new" standard had been used to calculate labor (man-hours) and overhead costs for ball bearings while the "old" standard was still being applied to cylindrical roller bearings, spherical roller bearings, and other types of bearings. *See Defendant's Memorandum in Partial Opposition*

to Plaintiffs' Motion for Partial Judgment Upon the Administrative Record ("Defendant's Memorandum") at 6. Commerce claims that the application of two standards would have potentially distorted the final determination cause a disproportionate amount of labor and overhead might have been attributed to the "non-ball" bearings. *Id.*

Commerce stated on the record that "[b]y revising the standards for one type of bearing, NTN-Japan created a distorted base for allocating the shared labor and overhead costs and, thereby, distorted its COP expenses for ball bearings." *Issues Appendix,* 56 Fed. Reg. at 31,733.

The figure Commerce arrived at to compensate for this inconsistency was the difference between the old and new costs as they pertained to ball bearings. This was done to maintain uniform cost calculations.

The remainder of the statistical information used by Commerce for cylindrical, spherical and other roller bearings was the data submitted by NTN in its questionnaire responses. Commerce did not disregard all the information provided by NTN, nor did it question the accuracy of the remaining data. Instead, it questioned the possible distorting effect on overall accuracy the ball bearing data might have. In addition, Commerce claims that BIA was appropriate because NTN failed to notify Commerce before verification that NTN had made this specific change in man-hour standards.

According to 19 U.S.C. § 1677e(c) (1988 & Supp. 1993),

> the [ITA] shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

Furthermore, "if the [ITA] is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action." 19 U.S.C. § 1677e(b).

The purpose of this statute is to induce respondents to provide Commerce with timely, complete and accurate information so that Commerce may determine antidumping duty margins as accurately as possible. *Rhone-Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990). It has been said that "one may view the best information rule * * * as an investigative tool, which that agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest." *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984).

The Court of Appeals for the Federal Circuit in *Olympic Adhesives, Inc. v. United States,* 899 F.2d 1565 (Fed. Cir. 1990), interpreted 19 U.S.C. § 1677e(b) as clearly requiring "*noncompliance with an information request* before resort to the best information rule is justified, whether due to refusal or mere inability." *Id.* at 1574 (emphasis in original). Commerce may not properly conclude that resort to the BIA rule is justified in circumstances where a questionnaire is sent and completely answered, just because the ITA concludes that the answers do not definitively resolve the overall issue presented. *Id.* Therefore, in order to

apply the BIA rule in this instance, Commerce has to show that NTN did not provide complete answers to the questions presented in Commerce's request.

Commerce insists that although NTN may have directly answered Commerce's questions and informed them that NTN changed its man-hour standards, NTN failed to give complete and accurate answers by not informing Commerce until verification that such a change had been made. *See Defendant's Memorandum* at 36. Commerce's regulations provide that the submission of factual information for consideration in a final determination shall be made not later than "seven days before the scheduled date on which the verification is to commence." 19 C.F.R. § 353.31(a)(1)(i) (1991). If the submission is thereby untimely then Commerce may resort to BIA. *See Elkton Sparkler Co. v. United States*, 17 CIT ____, Slip Op. 93–69 (May 7, 1993).

NTN, however, claims that Commerce was aware of this before verification because of a chart NTN submitted with its supplemental questionnaire responses on November 27, 1990—two months prior to the date of verification. Commerce claims this chart only indicates changes in standard *costs,* not changes in *man-hours,* which is a component of standard costs.

The chart, however, should have put Commerce on notice that perhaps man-hours were changed as they are a component of standard costs. Furthermore, Commerce never asked NTN to clarify the changes in standard costs in its questionnaire responses, nor did it return data on the "new" standard and point out any insufficiencies.

By its own admission, however, both in the Statement of Facts and its argument, Commerce never asked NTN to clarify any of the cost data it had already submitted for ball bearings in the Supplemental Questionnaire. Instead, it only asked in the Supplemental Questionnaire for NTN to quantify its revisions to standard costs for each class or kind of bearing under review. *See Defendant's Memorandum* at 5.

Commerce may not resort to best information available as an easy method to dispose of a case. Commerce's resort to BIA in this instance was an abuse of discretion since NTN substantially cooperated with Commerce. Thus, this cause is remanded to Commerce for recalculation of NTN's cost of production and constructed value without resorting to BIA.

4. *Idled Machinery Amount* (Counts X and XI):

Plaintiffs further claim that Commerce's inclusion of a theoretical amount for idled machinery not used in production and an amount representing NTN's loss on the disposal of fixed assets was unreasonable and in conflict with Commerce's use of actual costs as reflected in respondent's books and records. NTN claims that it did not include depreciation expenses on idle machinery and equipment not used for production, or losses on disposal of fixed in its reported cost of production and constructed value. In accordance with generally accepted accounting principles ("GAAP") in Japan, NTN does not record any

expense in its books and records to account for the theoretical depreciation. Commerce claims that a respondent's cost of production must include the respondent's costs from the depreciation of idled machinery and from the disposal of fixed assets.

In calculating the cost of production, Commerce is to "use the firm's expenses as recorded in its financial statements as long as those statements are prepared in accordance with the home country's generally accepted accounting principles ("GAAP") and do not significantly distort the firm's financial position or actual costs." *Ipsco, Inc. v. United States,* 12 CIT 1128, 1130 n.3, 701 F. Supp. 236, 238 n.3 (1988); *Carbon Steel Products from Brazil,* 49 Fed. Reg. 28,298, 28,302 (1984).

When calculating cost of production, Commerce generally uses those costs that are required to be reported by the respondent's home country's GAAP. Commerce, however, will not use a country's GAAP if it does not accurately recognize a company's actual costs, or if it distorts those costs. *Ipsco,* 12 CIT at 1130 n.3, 701 F. Supp. at 238 n.3.

According to NTN, Japanese GAAP do not require NTN to record the costs from the depreciation of idled assets and the disposal of fixed assets. *Plaintiffs' Motion* at 66. These costs, however, are costs involved in the ordinary course of business. The fact that the costs of depreciation from idled assets and the disposal of fixed assets are not recorded in NTN's books and records is irrelevant to whether these costs are actually incurred and should be included in NTN's cost of production. Furthermore, to not include them would distort the company's financial position. Therefore, this Court affirms Commerce's determination as to this issue as it was reasonable and in accordance with law.

5. *Calculation of Margins on Several Sales to One Purchase Price Customer* (Count XIII):

NTN also claims that Commerce committed a ministerial error in that due to Commerce's use of an original and replacement tape, margins on 46 sales to one purchase price customer were calculated twice. Upon reexamination of the administrative record, Commerce agrees that it calculated the margins for these 46 sales twice and, therefore, agrees that this case should be remanded to Commerce for recalculation of NTN's dumping margins to correct this error.

6. *Amended Final Determination* (Count XVII):

NTN finally claims that Commerce failed to publish an amended determination excluding incorrect data. The Court sees no need for the publishing of an amended final determination as this case is now remanded and the remand results will be published in the future.

Conclusion

In accordance with the foregoing opinion, plaintiffs' motion is granted in part and is remanded to Commerce to (1) recalculate NTN's variable costs of manufacture by merging the variable costs of manufacture for only home market bearing families; (2) recalculate NTN's cost of production and constructed value without resorting to BIA; and

(3) recalculate NTN's dumping margins to account for the 46 sales at issue only once. Plaintiffs' motion is denied in all other respects. Remand results are due within sixty (60) days of the date this opinion is entered. Comments to the remand results are due within thirty (30) days thereafter and responses to the comments are due within fifteen (15) days of the date comments are entered.

(Slip Op. 93–130)

FEDERAL-MOGUL CORP., PLAINTIFF AND PLAINTIFF-INTERVENOR, TORRINGTON CO., PLAINTIFF AND PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., PEER BEARING CO., NSK LTD., NSK CORP., CATERPILLAR INC., MINEBEA CO., LTD. AND NMB CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 91–07–00530

Defendant moves pursuant to Rules 1, 6 and 7 of the Rules of this Court for modification of *Federal-Mogul Corp. v. United States*, 17 CIT ___, Slip Op. 93–83 (May 25, 1993) to eliminate the requirement that the Department of Commerce, International Trade Administration ("ITA"), reinstate the "all others" cash deposit rate from the less-than-fair-value ("LTFV") investigation for entries made between May 1, 1992 and June 23, 1992, and to vacate the corresponding remand order.

Held: As a matter of law the ITA erred in calculating during this administrative review a new "all others" cash deposit rate for future entries made by unreviewed companies. Therefore, pursuant to Rule 54(b), this Court is entering final judgment on this issue ordering the ITA to reinstate the "all others" cash deposit rate from the LTFV investigation for entries subject to this administrative review's cash deposit rates made between May 1, 1992 and June 23, 1992.

[Defendant's motion denied; final judgment entered on this issue.]

(Dated July 15, 1993)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V and *Larry Hampel)* for plaintiff and plaintiff-intervenor Federal-Mogul Corporation.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Christopher J. Callahan, John M. Breen, Geert De Prest, Margaret E.O. Edozien, Lane S. Hurewitz, Patrick J. McDonough, Robert A. Weaver and *Amy S. Dwyer)* for plaintiff and plaintiff-intervenor The Torrington Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Jane E. Meehan);* of counsel: *John D. McInerney*, Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert, Stephen J. Claeys* and *Craig R. Giesze*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis, Susan E. Silver and *Niall P. Meagher)* for defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune, V. Kano and *Diane A. MacDonald)* for defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation.

Coudert Brothers (Robert A. Lipstein, Matthew P. Jaffe and *Nathan V. Holt)* for defendant-intervenors NSK Ltd. and NSK Corporation.

Venable, Baetjer, Howard & Civiletti (John M. Gurley, John C. Dibble and *Lindsay B. Meyer)* for defendant-intervenor Peer Bearing Company.

Powell, Goldstein, Frazer & Murphy (Richard M. Belanger, Neil R. Ellis and *D. Christine Wood)* for defendant-intervenor Caterpillar Inc.

Tanaka Ritger & Middleton (H. William Tanaka, Michele N. Tanaka and *Michael J. Brown)* for defendant-intervenors Minebea Co., Ltd. and NMB Corporation.

OPINION

TSOUCALAS, *Judge:* Defendant moves pursuant to Rules 1, 6 and 7 of the Rules of this Court for modification of *Federal-Mogul Corp. v. United States,* 17 CIT ____, Slip Op. 93–83 (May 25, 1993), to eliminate the requirement that the Department of Commerce, International Trade Administration ("ITA"), reinstate the "all others" cash deposit rate from the less-than-fair-value ("LTFV") investigation for entries made between May 1, 1992 and June 23, 1992, which have as yet not become subject to assessment pursuant to a subsequent administrative review, and to vacate the corresponding remand order. *Defendant's Motion for Modification of Slip Op. 93–83 and Vacatur of Remand Order ("Defendant's Motion").*

BACKGROUND

Plaintiff, Federal-Mogul Corporation ("Federal-Mogul"), commenced this action to challenge certain aspects of the ITA's final results in the first administrative review of imports of antifriction bearings ("AFBs") from Japan. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Final Results of Antidumping Duty Administrative Reviews ("Final Results"),* 56 Fed. Reg. 31,754 (1991).

Federal-Mogul filed a second motion for partial judgment on the agency record pursuant to Rule 56.1 of the Rules of this Court alleging that the ITA's use of the "all others" rate calculated during this administrative review for companies subject to the "all others" cash deposit rate from the LTFV investigation who were not examined during this review was not in accordance with law.

Specifically, Federal-Mogul argued that the ITA's use of the "all others" rate calculated during this administrative review as a new cash deposit rate for companies previously subject to the LTFV "all others" rate and not reviewed during this administrative review was not in accordance with 19 U.S.C. § 1675(a)(2) (1988) and 19 C.F.R. § 353.22(e)(1) (1991). *See Federal-Mogul,* 17 CIT at ____, Slip Op. 93–83 at 5–11.

Defendant argued that this Court should refuse to reach the issue of the ITA's use of the new "all others" rate as the cash deposit rate for companies which were not subject to review because publication of new cash deposit rates in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 28,360 (1992), made the issue moot.

On the merits, defendant argued that its actions were supported by substantial evidence on the administrative record and in accordance with law. *Federal-Mogul,* 17 CIT at ____, Slip Op. 93–83 at 11–13.

This Court found that the issue was not moot

> because the ITA's use of the new "all others" rate for unreviewed companies covers entries made between May 1, 1992 and June 23, 1992, which are not yet subject to an administrative review and have not yet been liquidated. Therefore, these entries are still subject to the Final Results at issue here and are within this Court's jurisdiction. 28 U.S.C. § 1581(c).

Id. at 13–14.

On the merits, this Court found that "[i]n a situation where a company's entries are unreviewed, the prior cash deposit rate from the LTFV investigation becomes the assessment rate, which must in turn become the new cash deposit rate for that company" citing 19 U.S.C. § 1675(a)(2). *Federal-Mogul,* 17 CIT at ____, Slip Op. 93–83 at 14–15.

This Court remanded this issue to the ITA "to allow the ITA to reinstate the 'all others' cash deposit rate from the LTFV investigation for entries made between May 1, 1992 and June 23, 1992, which have as yet not become subject to assessment pursuant to a subsequent administrative review." *Federal-Mogul,* 17 CIT at ____, Slip Op. 93–83 at 16–17.

Discussion

Defendant argues that this Court has not entered final judgment on this issue pursuant to Rule 54(b) but, nevertheless, has in effect ordered final relief by ordering the reinstatement of the "all others" cash deposit rate from the LTFV investigation for entries made from May 1, 1992 to June 23, 1992. Defendant essentially argues that the Court does not have the power to order this action by the ITA.

In support of its position, defendant relies on the Court of Appeals for the Federal Circuit's decision in *NTN Bearing Corp. of America v. United States,* 892 F.2d 1004, 1006 (Fed. Cir. 1989), which stated:

> As was said in *Melamine Chemicals, Inc. v. United States,* 732 F.2d 924, 934 (Fed. Cir. 1984) (emphasis in original), "The administrative handling of the involved entries of [merchandise] can be [a]ffected only by (1) a preliminary injunction pursuant to 19 U.S.C. § 1516a(c)(2), or (2) a *final* court decision adjudicating the legality, *vel non,* of the challenged determination. 19 U.S.C. § 1516(e)." Before a final court decision, therefore, the agency determination governs entry of merchandise. 19 U.S.C. § 1516a(c)(1) (1988).
>
> A partial summary judgment is not a final decision. Hence the trial court's instructions respecting duties constituted an improper attempt to affect the administrative handling of entries prior to any final court decision.

Defendant points out that the preliminary injunctions that have been issued in this consolidated case do not enjoin liquidation of entries made between May 1, 1992 and June 23, 1992, and no final decision or judg-

ment has been entered in this case. Therefore, deposits of estimated duties for entries made between May 1, 1992 and June 23, 1992, are still subject to the ITA's administrative determination. *NTN,* 892 F.2d at 1006.

Defendant states that 19 U.S.C. § 1516a(c)(1) requires that unless liquidation of entries has been enjoined by court order, entries of the merchandise covered by the contested administrative determination "shall be liquidated in accordance with the determination of * * * the administering authority * * * if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by * * * the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination." Defendant argues that pursuant to *Timken Co. v. United States,* 893 F.2d 337, 341–42 (Fed. Cir. 1990), the notice referred to in 19 U.S.C. § 1516a(c)(1) is the first notice of final court decision adverse to the administering authority.

In addition, defendant argues that while this Court has not ordered liquidation of entries made between May 1, 1992 and June 23, 1992 at the LTFV "all others" rate, that is the actual result of the remand at issue in this case and that such action is in conflict with *NTN,* 892 F.2d at 1006. *Defendant's Motion* at 4–8.

Finally, defendant also argues that parties whose entries of the subject merchandise are covered by the outstanding dumping order were required to request an administrative review of the entries at issue here during the month of May, 1993. Defendant argues that these parties made their decision whether or not to request a review based on the cash deposit rate derived from the first review which this Court has now ordered changed. Defendant argues that since *Federal-Mogul,* 17 CIT ____, Slip Op. 93–83, was entered on May 25, 1993, interested parties had only six days to decide if they wished to request an administrative review based on the cash deposit rates from the LTFV investigation, assuming they were even aware of this Court's decision. *Defendant's Motion* at 8–10. Defendant argues that "fairness requires that the 'all others' rate from the LTFV investigation not be reinstated retroactively in circumstances in which the parties' time for requesting an administrative review is likely to have expired without an opportunity to avoid automatic assessment at the reinstated cash deposit rate." *Id.* at 10.

Federal-Mogul opposes defendant's motion arguing that the challenged Final Results at issue here set the cash deposit rate for entries made between May 1, 1992 and June 23, 1992, and that Federal-Mogul clearly has the right to challenge these cash deposit rates as part of its challenge to the Final Results. Federal-Mogul argues that nothing in *NTN* prevents this Court from ordering the ITA to reinstate the LTFV investigation "all others" cash deposit rate for these entries which are still subject to the cash deposit rates set in the Final Results. *Opposition of Federal-Mogul Corporation, Plaintiff, to Defendant's Motion for*

Modification of Slip Op. 93–83 and for Vacatur of Remand Order ("Federal-Mogul's Opposition") at 2–3.

Federal-Mogul argues that the defendant's reliance argument is also weak since defendant identifies no party who has been affected by this Court's order. Federal-Mogul argues that there could not have been any detrimental reliance by any interested party because all parties interested in trade in antifriction bearings from Japan must have known that the new "all others" cash deposit rate from the first administrative review had been challenged in this case before the May 31, 1993 deadline to request an administrative review covering entries made between May 1, 1992 and June 23, 1992, and because this Court issued Slip Op. 93–83 six days before the May 31, 1993 deadline. *Federal-Mogul's Opposition* at 3–4.

In *Federal-Mogul,* 17 CIT ____, Slip Op. 93–83, this Court found that as a matter of law the ITA is required to continue to use the LTFV "all others" cash deposit rate as the new cash deposit rate for entries of AFBs from Japan made by companies which were not subject to review as part of the first administrative review of entries of AFBs from Japan. This Court remanded this issue to the ITA to reinstate the LTFV "all others" cash deposit rate for unreviewed companies. *Id.* at 16–17.

As to the defendant's reliance argument, this Court finds that all interested parties were, or should have been, on notice that the "all others" cash deposit rate from the Final Results of the first administrative review was being challenged in this action. Since this Court's decision in *Federal-Mogul,* 17 CIT ____, Slip Op. 93–83, was entered on May 25, 1993, six days before the deadline for requesting an administrative review of entries made between May 1, 1992 and June 23, 1992, all interested parties were, or should have been, on notice that this Court ordered the ITA to reinstate the LTFV "all others" cash deposit rate.

Due to the complexity of, and length of time required to complete, administrative reviews of the antidumping duty order on antifriction bearings from Japan, the ITA is often able to argue that issues dealing with cash deposit rates become moot upon publication of cash deposit rates in subsequent administrative reviews. That is what defendant argued in this case. This Court rejected that argument in *Federal-Mogul,* 17 CIT at ____, Slip Op. 93–83 at 13–14. However, defendant continues to use this argument as a way to avoid following the orders of this Court in regard to issues which involve cash deposits only. This Court refuses to condone defendant's attempts to avoid the clear dictates of the law.

However, this Court now agrees with defendant that it cannot on remand, pursuant to a partial summary judgment, order the ITA to reinstate the "all others" cash deposit rate from the LTFV investigation for entries subject to this administrative review's cash deposit rates made between May 1, 1992 and June 23, 1992. This Court agrees that in order to do so the Court must enter final judgment on this issue pursuant to Rule 54(b). *NTN,* 892 F.2d at 1006.

Therefore, since as a matter of law the ITA erred in calculating during this administrative review a new "all others" cash deposit rate for future entries made by unreviewed companies, and since there is no just reason for delay in the entry of final judgment on this issue, this Court is entering final judgment on this issue ordering the ITA to reinstate the "all others" cash deposit rate from the LTFV investigation for entries subject to this administrative review's "all others" cash deposit rate made between May 1, 1992 and June 23, 1992.

(Slip Op. 93–131)

SAHA THAI STEEL PIPE CO., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND WHEATLAND TUBE CORP. AND THYPIN STEEL CO., INC. DEFENDANT-INTERVENOR

Court No. 91–11–00813

[Plaintiff challenges two aspects of final determination of Department of Commerce: the "best information available rate" applied to other producers and the country-wide rate applied to plaintiff. *Held:* Defendant did not abuse its discretion in assessing the rates. Judgment for defendant.]

(Decided July 15, 1993)

Dickstein, Shapiro & Morin (Arthur J. Lafave III, Jeffrey W. Brennan, Douglas N. Jacobson) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, U.S. Department of Justice, Civil Division, Commercial Litigation Branch *(Vanessa P. Sciarra); Wendell L. Willkie*, General Counsel, U.S. Department of Commerce; of counsel: *Jeffrey B. Denning*, U.S. Department of Commerce, Office of Chief Counsel for Import Administration, for defendant.

Schagrin Associates (Mark C. Del Bianco) for defendant-intervenor Wheatland Tube Corporation.

Sharretts, Paley, Carter & Blauvelt, P.C. (Michael H. Greenberg) for defendant-intervenor Thypin Steel, Inc.

MEMORANDUM OPINION

MUSGRAVE, *Judge:* Plaintiff Saha Thai Steel Pipe Co., Ltd. ("Saha") challenges two aspects of the final determination by the International Trade Administration, United States Department of Commerce (the "ITA" or the "Department" or "Commerce"), in the 1958 countervailing duty administrative review ("1988 Review") involving carbon steel pipes and tubes from Thailand. *See Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand, Final Results of Countervailing Duty Administrative Review* 56 Fed. Reg. 50,852 (Oct. 9, 1991).

Saha responded fully to a United States subsidy investigation for which Saha itself had petitioned. Saha now challenges the "best information available" ("BIA") rate applied to the non-responding exporters because Saha contends that standard Commerce practice required the application of a higher, indeed the highest, rate to those exporters. Saha also contends that Commerce violated its statutory duty by not even considering the case in which the higher rate had been published. As a

result, Saha contends that the nation-wide weighted average was lowered, because Commerce improperly selected a lower BIA rate, to such an extent that Saha was precluded from benefitting from a company-specific rate that was substantially lower still.

Defendant argues that the issue of the BIA rate selection is not properly before this Court because Saha knew that Commerce used the lower rate as BIA and did not protest.[1] Moreover, defendant argues that Commerce's use of the lower rate for the non-responding exporters reflecting a Thai Investment Promotion Act ("IPA") section 28 subsidy was a reasonable exercise of its administrative discretion and was in accordance with law. Commerce maintains that it may not use for BIA a rate that included benefits from another program not under consideration in the 1988 review. The rate urged by Plaintiff was the result of a combined calculation based on IPA section 28 *and* section 36 subsidies.

BACKGROUND

The facts and procedural history in this case are particularly important, in Saha's view, because they point to the inequity, if not the illegality, of Commerce's position. On September 20, 1989, Commerce initiated a review, upon Saha's request, of the countervailing duty order covering all exports of certain circular welded carbon steel pipes and tubes from Thailand during the calendar year 1988. Petitioner evidently sought a downward adjustment of duties in place since 1985, and alleges full cooperation, in conjunction with the Royal Thai Government ("RTG"), with the inquiry. *Plaintiffs Memorandum* at 4. Five other producers responsible for substantial exports declined to respond to the Commerce questionnaire. *Id.*

On June 26, 1991, Commerce published the preliminary results of the 1988 review. 56 Fed. Reg. 29,222. Based on Saha's response, Commerce determined that Saha received a total "bounty or grant" of .90 percent *ad valorem*. Based on BIA, in accordance with 19 U.S.C. § 1677e(c), Commerce found that the non-responding exporters received benefits from tax and duty exemptions under section 28 of the IPA and other programs. Consequently, Commerce published a separate 7.18 percent duty for all other producers and exporters. *Id.;* 56 Fed. Reg. 29,222; *A.R. 17.* Saha did not object to these preliminary results because it agreed with Commerce's calculations and the company-specific rate assessed to it. According to Saha, several U.S. importers and exporters argued during a brief hearing that the benefit rate assessed these other exporters had been overstated. No party challenged Commerce's decision to establish the separate rate for Saha. *Plaintiff's Memorandum* at 6.

In the final administrative review determination, Commerce's finding regarding the grant to Saha did not change (.90 percent). Because the other exporters did not provide information regarding section 28 grants, Commerce "used * * *, as BIA, the highest published non-BIA rate found for the IPA program in a final determination in an investiga-

[1] Defendant-intervenor Wheatland Tube Corporation did not submit briefs in this action.

tion or the final results of an administrative review for any product." 56 Fed. Reg. 50,853–54. Commerce considered four different subsidy programs individually in its rate calculation for the non-responding producers; section 28 and section 36 were but two of those four programs. Assertedly applying this test for the section 28 portion of its calculation, Commerce selected, as the highest "published non-BIA rate," the rate published in *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Carbon Steel Butt-Weld Pipe Fittings From Thailand,* 55 Fed. Reg. 1,695 (Jan. 18, 1990) *("Butt-Weld Pipe Fittings")* which was 1.89 percent *ad valorem.* 56 Fed. Reg. 50,584.

Subsequent to publication of the preliminary results, interested parties had thirty days to submit to Commerce their case briefs containing comments upon the preliminary results and seven days thereafter to submit rebuttal briefs. *See* 19 C.F.R. § 355.38(c). Saha Thai did not submit a case brief. Although Saha Thai did submit a rebuttal brief, it did not therein object to Commerce's decision to use the 1.89 percent *ad valorem* rate from *Butt-weld pipe* as BIA for IPA section 28.

In response to the comments submitted by several interested parties, Commerce changed the basis upon which it calculated the BIA rates applied to the non-responding companies in its final review determination with respect to two of the *other* programs *(i.e.,* other than IPA section 28), reducing the total net "bounty or grant" found for the nonresponsive companies to less than 5.0 percent. 56 Fed. Reg. 50,854. As a result, the weighted-average net bounty or grant for all companies (including Saha) fell from 7.18 percent to 2.86 percent *ad valorem.* Commerce has the discretion not to publish a separate company rate when a certain company's rate was not "significantly different" from other exporters' rates for purposes of 19 C.F.R. § 355.22(d)(2). "[S]ignificantly different," for purposes of 19 C.F.R. § 355.22(d)(2), is defined as more than 5.0 percent. Since Saha's assessed rate of .90 percent *ad valorem* was within five percentage points of the revised group assessed rate of 2.86 percent *ad valorem,* Commerce exercised its discretion not to enter a company-specific rate of .90 percent to Saha. Rather, Commerce assessed a uniform country-wide rate of 2.86 percent *ad valorem* on all producers subject to the investigation, including Saha.

Discussion

1. *Exhaustion of Administrative Remedies:*

As a threshold issue, Commerce argues that because Saha did not raise any objections to the selection of *Butt-Weld Pipe Fittings* for the section 28 rate after the preliminary determination, even though it had that opportunity to do so in its rebuttal brief, Saha may not now address such complaints to this Court. *Defendant's Memorandum* at 6. Plaintiff, on the other hand, argues that the issue raised on this appeal – whether Commerce erred in selecting the IPA section 28 rate in *Butt-Weld Pipe Fittings* as BIA for the non-cooperating exporters and should instead

have used the higher rate published in *Ball Bearings*[2] – is a question of law and therefore places no great burden on the Court or the parties.[3] Moreover, plaintiff asserts that it had no cause to object until Commerce reversed itself in its final determination. Saha was satisfied with the .90 percent rate assessed to it at the preliminary determination.

Both parties have agreed that the doctrine of exhaustion of administrative remedies is discretionary. The Court, after duly considering defendant's well-reasoned arguments, finds that to preclude plaintiff from raising the issue of whether the section 28 rate was properly selected would constitute an overly harsh penalty on Saha Thai. The Court is mindful that Saha Thai initiated this review and cooperated fully in the investigation with the intent of having its countervailing duty assessment lowered to reflect the actual benefit of its subsidies. In addition, Saha Thai received all the remedy it sought from the preliminary determination, *i.e.*, it received a very low company-specific duty assessment at .90 percent.

Defendant urges an application of the exhaustion doctrine that would motivate all interested parties to an administrative review to brief and litigate every possible issue, even when the relief sought appears to have been secured at the preliminary determination. This policy would result in much more wasteful litigation than will be caused by a hearing of the section 28 rate selection issue here. Had the Department not chosen to do an about-face and penalize Saha Thai with a country-wide rate in the final determination, this entire case, much less the issue of the BIA rate from section 28, would not be before the Court. Thus, the Court finds that fairness and judicial economy weigh in favor of permitting plaintiff to raise the issue of the proper section 28 rate at this time before the Court. In contrast, neither defendant nor defendant-intervenor are seriously prejudiced by this decision.[4] Therefore, the Court proceeds to an analysis of plaintiff's argument regarding whether defendant abused its discretion in choosing the BIA rate from *Butt-Weld Pipe Fittings* for section 28.

2. *Best Information Available:*

Plaintiff concedes that Commerce was justified, under 19 U.S.C. § 1677e(c), in using BIA. *See Plaintiff's Memorandum* at 8. However, Plaintiff claims that Commerce neglected to select the "highest published non-BIA rate" for section 28 of the IPA program and cites a previous 19.38 percent section 28 rate determination. *Ball Bearings*, 54 Fed. Reg. 19,130, 19,134. Had the 19.38 percent *ad valorem* rate been applied, Saha would have received a separate company-specific rate previously determined at .90 percent because the difference in the weighted

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[2] *Final Affirmative Countervailing Duty Determination and Partial Countervailing Duty Order: Ball Bearings and Parts Thereof from Thailand; Final Negative Countervailing Duty Determinations: Antifriction Bearings (other than Ball or Tapered Roller Bearings) and Parts Thereof from Thailand*, 54 Fed. Reg. 19,130, 19,134 (May 3, 1989) ("Ball Bearings").

[3] *See e.g., Hercules, Inc. v. United States*, 11 CIT 710, 735, 673 F. Supp. 454, 476 (1987); *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 136, 583 F. Supp. 607, 611 (1984).

[4] *See Rhone Poulenc*, 7 CIT at 136, 583 F. Supp. at 611.

country average would have exceeded the maximum 5 percent for assessing a uniform duty. *Plaintiff's Memorandum* at 9.

The rate published in *Ball Bearings* represented benefits received by the respondents under two related sections of the IPA, section 28 and section 36(1). IPA section 28 provides tax and duty exemptions on imported equipment and parts; IPA section 36(1) provides tax and duty exemptions on imported consumable goods not physically incorporated in the finished, exported product. *Plaintiff's Memorandum* at 9, *citing Ball Bearings* at 19,134. Commerce did not investigate IPA section 36(1) in the instant administrative review.

According to plaintiff, Commerce's decision in *Ball Bearings* to publish a combined rate for IPA sections 28 and 36(1) was purely one of discretion. Plaintiff asserts that publication of separate rates for each benefit would have been consistent with law and prior practice. *Plaintiff's Memorandum* at 9. In essence, plaintiff contends that Commerce was obligated to use the 19.38 percent rate found in *Ball Bearings* for BIA in this case, even though that rate was the result of an investigation into section 36 grants in addition to section 28 grants. In the alternative, plaintiff urges that at the very least, Commerce abrogated its duty to apply its own BIA test consistently by *not* referring to the *Ball Bearings* decision to determine what the specific section 28 component of the combined rate was.

Section 776(b) of the Tariff Act of 1930, as amended, ("the Act"), 19 U.S.C. § 1677e(c), mandates that, in making its determinations, Commerce shall "use the best information otherwise available" "whenever a party or any other person refuses or is unable to produce information requested." In the instant case, five exporters of the subject merchandise did not provide any information in response to Commerce's countervailing duty questionnaire and, specifically, did not provide any information indicating that they did not benefit from IPA section 28. Commerce therefore properly resorted to BIA.

Plaintiff contends that as a matter of law, defendant was required to pick the highest known rate previously established in a review for the section 28 program as BIA. Plaintiff cites *dicta* from the Court of Appeals for the Federal Circuit ("CAFC") for the proposition that the best information rule may be viewed "as an investigative tool, which th[e] agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest." *Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130 134, 744 F.2d 1556, 1560 (Fed. Cir. 1984).

Plaintiff also contends that Commerce has a well-established policy in countervailing duty proceedings to use, as BIA the "highest published non-BIA rate" for a given program in any determination involving the same country. *Plaintiff's Brief at 11.*[5] In fact, plaintiff notes that Com-

[5] Plaintiff cites for example, *Final Affirmative Countervailing Duty Determination; Industrial Belts and Components Thereof, Whether Cured or Uncured, from Israel*, 54 Fed. Reg. 15,509, 15,511 (Apr. 2, 1988); *Final Affirmative Countervailing Duty Determination: Industrial Phosphoric Acid from Israel*, 52 Fed. Reg. 25,447, 25,448–50 (July 7, 1987); *Preliminary Affirmative Countervailing Duty Determination: Certain Iron-Metal Construction Castings from Mexico*, 47 Fed. Reg. 56, 377, 56,378–79 (Dec. 16, 1982).

merce established the very same test in the case at bar, stating that it "used, as BIA, the highest published non-BIA rate found for the IPA program in a final determination in an investigation or the final results of an administrative review for any product." 56 Fed. Reg. 50,852, 50,854 (Oct. 9, 1991).[6]

The CAFC later clarified its interpretation of how Commerce was permitted to apply BIA though it avoided the "difficult question of whether the agency may use the best information rule to 'penalize' a party which submits deficient questionnaire responses:"

> That is not what the agency did in this case. In order for the agency's application of the best information rule to be properly characterized as 'punitive,' the agency would have had to reject low margin information in favor of high margin information that was demonstratively less probative of current conditions. Here, the agency only *presumed* that the highest prior margin was the best information of current margins. Since Rhone Poulenc offered no evidence showing that recent margins were more probative of current conditions than the highest prior margin, the agency found the highest prior margin to be the best information otherwise available.

Rhone Poulenc, Inc. v. United States, 8 Fed. Cir. (T) 61, 67, 899 F.2d 1185, 1190 (Fed. Cir. 1990). In other words, in the case of the non-responding party, an assumption is made that if that party possessed probative information justifying a lower rate than the highest previously published rate, it would have offered that information to Commerce as a matter of its economic interest. When the party does not respond, it is reasonable to presume that accurate information regarding that aspect of the duty calculation would have led to an assessment of equal or greater magnitude than the highest prior margin. Indeed, none would suggest that a party be rewarded for non-compliance. The Court in *Rhone Poulenc,* held that this presumption was reasonable and not punitive.

Moreover, the ITA's implementing regulations permit the Department flexibility in determining what is "best information" depending on the reasons for the non-compliance. *See id.* at 67, 899 F.2d at 1191, *citing* 19 C.F.R. § 353.51 (1988) ("where a party * * * refused to provide requested information, that fact may be taken into account in determining what is the best available information"); *see* 19 C.F.R. § 353.37(a) (1992). As *Rhone Poulenc* teaches, the best information rule and the Department's flexibility to apply the noncompliance presumption serve the dual interests of encouraging compliance, and determining current margins as accurately as possible – a fundamental goal of the statute. *Rhone Poulenc,* 8 Fed. Cir. (T) at 68, 899 F.2d at 1191.

Recently, beginning with the administrative review of antidumping duty orders covering antifriction bearings, Commerce formalized its

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[6] Plaintiff further notes that in the final review results, Commerce cited two determinations in which it had relied on this type of information as BIA. *Plaintiff's Brief at 11.*

flexible administration of BIA in a two-tier approach hinging on the level of cooperation of the party that has not submitted sufficient information.[7] Following that approach, the more cooperative party can expect the agency to pick a more favorable rate as "best information." *See id.* at 5–6. The CAFC in *Allied-Signal Aerospace,* after finding little guidance in the legislative history, found that Congress "explicitly left a gap" in the statute as to exactly what should constitute "best information." *Allied-Signal Aerospace Co.,* at 13, *citing Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–44 (1984). Accordingly, the ITA's construction of the statute in determining how and what it selected as BIA was conferred considerable deference. *See id.,* at 13. The CAFC upheld the Department's two-tier approach, even though it rejected Commerce's selection of harsher tier because it found that in fact the party in question had cooperated. *See Allied-Signal Aerospace Co.,* at 15–16.

In the case at bar, however, Saha Thai would have the Court do the opposite: constrain the Department to the harsher rate as BIA because the parties *did not* cooperate. The Court is not prepared to force that conclusion based on the facts of this case. First, the *Allied-Signal Aerospace* court stressed the broad discretion Commerce has in implementing the best information rule. Second, and perhaps more importantly, the court focused on the laudatory statutory purpose underlying the BIA rule provided in 19 U.S.C. § 1677e, which is to facilitate the determination of dumping margins as accurately as possible within the confines of extremely short statutory deadlines. *See id. at 14.*

Toward this purpose, the agency presumption is rebuttable. *Rhone Poulenc,* 8 Fed. Cir. (T) at 68, 899 F.2d at 1191. Therefore, if the Department is presented with credible evidence between the preliminary determination and the final determination of a more accurate rate, the Department must be permitted the flexibility to chose the lower rate, even if the result is that the non-cooperating parties experience some gain from that change. To summarize, the issue in this case is not, as plaintiff urges, whether Commerce must woodenly apply the highest rate ever previously established as BIA for non-cooperating parties. Rather, the issue is whether Commerce acted reasonably in selecting the lower rate from *Butt-weld Pipe Fittings* as BIA for section 28 of the IPA after considering the parties' comments on the preliminary determination. Put another way, the Court must determine whether Commerce acted reasonably in discarding *Ball-Bearings* because the benefits from sections 28 and 36 of the IPA were not segregated in the final 19.38 percent duty determination. The Court must also decide whether Commerce had a duty to investigate the *Ball Bearings* case to determine the differential between the section 28 and section 36 components of the 19.38 percent duty.

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[7] *See Allied-Signal Aerospace Co. v. United States,* No. 93–1049, (Fed. Cir. June 22, 1993) ("Allied-Signal Aerospace") for a detailed exposition and approval of Commerce's two-tier approach.

This Court has held that the choice of BIA need not be the "best" information the agency could have possibly acquired. *See N.A.R., S.p.A. v. United States,* 14 CIT 409, 416, 741 F. Supp. 936, 942 (1990), *citing Chinsung Indus. Co. v. United States,* 13 CIT 103, 106, 705 F. Supp. 598, 601 (1989). "Otherwise, the administrative process would be frustrated and the burden of creating an adequate record would shift from respondents to the ITA citation omitted]. The Court must uphold ITA's use of best information available if the use of that data is supported by substantial evidence in the record and otherwise in accordance with law." *N.A.R., S.p.A.,* 14 CIT at 416, 741 F. Supp. at 942. Accordingly, plaintiffs argument that the Department was compelled to apply the rate from *Ball Bearings* because it was higher must fail.

Defendant responds that some of the information needed to discern the value of the section 28 subsidy from the combined section 28 and section 36 subsidy program is under protective order, and that the administrative burden would be significant. Commerce points out that all the cases cited by Saha that stand for the selection of the highest non-BIA rate were adopted from identical programs. Indeed, there is no case where this rate was adopted from a program that was not identical. *Defendant's Brief* at 18–19. The Court does not view the confidentiality problem as such a barrier in this case, but does agree with defendant that to place such an administrative burden on the Department in every case is not in harmony with the purpose of BIA or the deference afforded by the courts to the agencies in administering the antidumping laws. *See Chemical Products Corp. v. United States,* 10 CIT 626, 628, 645 F. Supp. 289, 291 (1986), *vacated on other grounds,* 10 CIT 819,651 F.Supp. 1449 (1986). Indeed, the Department's policy of choosing the highest rate that is *published* was designed to avoid the very situation at bar and its accompanying administrative inconvenience. Plaintiff would require that the Department disect a published combined rate to discern an *unpublished* component of that combined rate, notably the portion of the rate attributable to the section 28 subsidy. The Court will not impose such a burden on the ITA.

In selecting a BIA rate for a given subsidy program, Commerce asserts its practice is to select the highest published non-BIA rate for the *identical* program in the same country. *Defendant's Brief* at 16 (emphasis added). Commerce further maintains that the *Butt-Weld Pipe* late was the highest for IPA section 28. *Id.* Moreover, this rate was reasonable because it concerned a similar industry and an identical time period as that used for the 1988 Review. *Id.* That there may have been an even more reasonable method or choice is moot because the Court may not substitute its reasonable choice for the reasonable choice of the agency. *See e.g., Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978); *ICC Industries, Inc. v. United States,* 5 Fed. Cir. (T) 78, 812 F.2d 694 (Fed. Cir. 1987). *American Spring Wire Corp. v. United States,* 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984); *Mitsubishi Materials Corp. v. United States,* ___ CIT ___, Slip Op. 93–62 (April 27, 1993).

As discussed above, where Congress did not lay out specific guidelines for the Department to follow, Congress left the Department broad discretion in administering the antidumping laws. Congress has not provided the Department with meaningful instruction as to what "best evidence" actually means. In the absence of such guidance, this Court may not require the Department to pry open every case that in some way sheds light on the subsidy at issue in the current administrative review. Commerce's choice of *Butt-Weld Pipe Fittings,* from a similar program in a similar time period sufficiently fulfilled the Congressional mandate to obtain the "best information." Commerce was not required to reopen another case and determine the section 28 component of a combined rate issued during a different period in a different industry.

Of at least equal importance, the Department's revised overall rate appears much more accurate than the initial rate used for the preliminary determination. Defendant-Intervenor points out that Commerce itself conceded that its 7.18 percent "all other" rate issued after the Preliminary Determination (which was the culmination of several factors including the *Butt-Weld Pipe* section 28 rate component) was based upon "unrepresentative and extraordinarily high surrogate data." *Defendant-Intervenor Memorandum* at 3, *citing* 56 Fed. Reg. at 50, 853. Therefore, the Department has honored one of the fundamental principles underlying the trade statute – accuracy. It is this endeavor for accuracy, within the limits of strict deadlines, that lends respectability to U.S. trade statutes in the international community. Indeed, as the defense points out, Commerce has been instructed by this Court and the Federal Circuit to seek to avoid the use of unrepresentative or extraordinarily high surrogate data as BIA. *See N.A.R., S.p.A. v. U.S.,* 14 CIT at 416–18, 741 F. Supp. at 942–43 (1990) (detailed discussion of what constitutes BIA); *Olympic Adhesives, Inc. v. U.S.*, 8 Fed. Cir. (T) 69, 76, 899 F.2d 1565, 1572 (Fed. Cir. 1990) (BIA rates may not be arbitrary).

Had Commerce selected the 19.38 percent rate from *Ball-Bearings* rather than the 1.89 percent rate from *Butt-weld Pipe Fittings,* it would have contradicted its above-cited efforts to use more representative data regarding the programs other than section 28 that were reassessed after the preliminary review. In any event, Commerce has satisfied the guidelines for BIA set forth in *N.A.R.*

3. *Country-wide Rate:*

Finally, Commerce maintains that its decision not to grant Saha a company-specific rate was within its discretion and the relevant statutory and regulatory framework. *See,* 19 U.S.C. § 1671e(a)(2)(A) (1992); 19 C.F.R. § 355.22(d)(2) & (3) (1992). Section 1671e(a)(2) provides that the countervailing duty rate shall apply uniformly to all merchandise of the same kind exported from the country under investigation unless "the administering authority determines there is a significant differential between companies receiving subsidy benefits." *See* 19 U.S.C. § 1671e(a)(2)(A).

This Court discussed this statutory provision and its legislative history thoroughly in *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 406, 636 F. Supp. 961, 969–69 (1986); See also, *Ipsco, Inc. v. United States,* 8 Fed. Cir. (T) 80, 84–86, 899 F.2d 1192, 1194 (1990); *Cementos Anahuac Del Golfo, S.A. v. U.S.*, 12 CIT 401, 411, 687 F. Supp. 1558, 1567 (1988), *rev'd on other grounds*, 7 Fed. Cir. (T) 113, 879 F.2d 847 (1989). This Court has held that the statute establishes a preference for the employment of country-wide rates by the agency. This preference appears to stem largely from the fear of the administrative burden potentially placed on agencies with limited resources and strict time constraints were the agency to attempt to determine the actual benefit received by each firm and then set company-specific rates. *See H.R. Rep. No. 1156, 98th Cong., 2d Sess. 180, reprinted in 1984 U.S. Code Cong. & Admin. News 4910, 5297.; Ceramica,* 10 CIT at 406, 636 F. Supp. at 968. Thus it is the general practice of the ITA, as encouraged by the statute, to calculate a country-wide duty rate. "Country-wide rates are particularly useful where * * * a large number of companies are involved." *Ceramica,* 10 CIT at 406, 636 F. Supp. at 968.

Several factors distinguish the case at bar from *Ceramica.* In *Ceramica*, the ITA expressed concern about administrative burden, and tracking down a multitude of companies within strict deadlines. In the case at bar, very few companies are involved. Rather there are six companies, one of which cooperated fully, thereby alleviating the administrative burden. In fact, the company-specific rate has *already* been calculated at the preliminary determination for this company, Saha Thai, in part due to its cooperation.

Saha understandably feels it has been punished as the sole company that cooperated with the Administration in order to achieve a more accurate rate. At oral argument, defendant countered that the country-wide rate is particularly suited for countervailing duty determinations as a means to punish the behavior of the *country*, once it has been established that country's companies are trading unfairly under the statute. According to this theory, the state practicing unfair subsidization is on notice that it is putting companies such as Saha at economic risk. Presumably it would then be up to the aggrieved company to complain to its government for an upward adjustment of its actual benefit to reach the assessed country-wide rate, or, in the alternative, decline the benefit altogether in the future.

Defendant cited *Ipsco* generally at oral argument for the proposition that Congress especially expressed a preference for country-wide rates in cases of subsidization because of the state conduct. *See Ipsco,* 8 Fed. Cir. (T) at 86, 899 F.2d at 1197, *citing* 53 Fed. Reg. 52,306, 52,325 ("Unlike the antidumping law, which is directed to company-specific activity, the countervailing duty law is directed at government or government-sponsored activity.")

Section 355.22(d) of 19 C.F.R. provides the following:

> (2) If the Secretary decides that an individual (including government-owned) producer or exporter received a significantly different net subsidy during the period, the Secretary will state in the final results an individual rate for that person, and that rate will be the basis for the assessment of countervailing duties and, except as provided in paragraph (c)(7)(iii) of this section, the cash deposit of estimated countervailing duties for that person.
>
> (3) A significant differential is:
>
> (i) A difference of the greater of at least five percentage points, or 25 percent, for the weighted-average net subsidy calculated on a country-wide basis; or
>
> (ii) The difference between a net subsidy of zero (or *de minimis)* and any rate greater than *de minimis.*

After the adjustment, Saha's rate was within the permissible five percentage points determining the application of a country-wide rate. Had Commerce applied the 19.38 percent rate from *Ball Bearings* for IPA section 28 to the non-responding exporters, the weighted average countervailing duty rate would have exceeded 10.00 percent. Since Saha's individual benefit rate was only .90 percent, Commerce would have concluded that the benefit received by Saha was "significantly different" and published the original .90 percent rate. The Department's practice of setting the scope of the country-wide rate as including all rates within five percent is well established and reasonable. The Court may not reverse the Department when it has followed its own reasonable regulations, even though the result may appear cruel to plaintiff.

Although the Court is mindful of the important policies of admonishing countries who subsidize and reducing the burden of assessing individual rates, Commerce's decision to include Saha in the country-wide rate operates as a *de facto* penalty on Saha, the one company that cooperated fully in the investigation underlying this review. Counsel for defendant was not able to cite any other case where a company had fully cooperated in the review, was assessed a low company rate at the preliminary determination, and then was pooled at a higher country-wide rate. The Court requested that defendant provide it with such information if it existed and has received nothing to date. Likewise research has not brought any analogous situation to light in the reported cases. Although the Court finds that the rate assessments were supported by substantial evidence and otherwise in accordance with law, defendant is urged but not ordered to reconsider its decision to include Saha in the country-wide rate, and favor accuracy and cooperation by restoring Saha's individual rate of .90 percent established in the preliminary determination.

As noted above, the opposing policy concern of administrative feasibility has been cured in this case because Saha's rate has been determined with precision previously, in part due to its cooperation.[8] The

[8] The Department would ultimately be administering a mere two rates for the entire industry, one for the cooperating company and one country-wide rate for the noncooperating companies.

alternative policy suggested by defendant, that the countrywide rate was designed to punish the country, regardless of incidental effects on individual companies, is not reflected in the statute or a fair reading of *Ipsco*.

For the reasons set out above, the Court finds that it would be equitable to restore plaintiff's .90 percent rate. However, defendant's actions in this matter are in accordance with law. Accordingly, judgment is entered for defendant, and this case is dismissed.

(Slip Op. 93–132)

FORMER EMPLOYEES OF FINA OIL & CHEMICAL CO., PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 89–07–00410

[Plaintiff Duncan's motion to vacate default judgment denied.]

(Dated July 16, 1993)

Paul T. Duncan pro se.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Cynthia B. Schultz);* and Office of the Solicitor, U.S. Department of Labor *(Scott Glabman),* of counsel, for the defendant.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* Upon receipt of a letter complaining that Donald J. Hickombottom, Jerry P. Bowen and Paul T. Duncan had been denied certification of eligibility to apply for adjustment assistance under the Trade Act of 1974, as amended, the Clerk of the Court of International Trade notified Mr. Hickombottom, the first-named petitioner before the Department of Labor, that the letter was deemed a duly-filed Summons and complaint. After joinder of issue, the undersigned sought to hold a scheduling conference pursuant to CIT Rule 16(b) with both sides. When such a conference did not materialize, a default judgment dismissing this action was entered on September 12, 1990, reciting the facts that the court had sought to schedule the action for disposition by communicating in writing and by telephone with Mr. Hickombottom, *pro se* on behalf of the plaintiffs, and that he had failed to respond or otherwise indicate a desire to prosecute this action.

Comes now Paul T. Duncan, also a signer of the original letter complaint, praying that the default judgment be vacated upon the following representations, among others:

> * * * I was never contacted by the court or defendant and * * * my fellow plaintiff, Mr. Donald J. Hickombottom failed, despite repeated attempts on my part, to provide information concerning the status of the above styled action.
>
> * * * * * * *

> I may have not contacted the court for two and one half years since the time of the dismissal but I was unaware of any action by the court and that a determination had been made concerning the case * * *.
>
> As far as I have been able to determine, Mr. Bowen is out of the country in Saudi Arabia and has been for some time. I have been unable to contact him in any manner for the past three years. Mr. Hickombottom's explanation of what had transpired was vague and uninformative. I asked him for all materials he had in his possession and he repeatedly promised to provide them to me. After being promised by Mr. Hickombottom on several occasions and for many months to be supplied with all documents and notes he possessed, I finally despaired of Mr. Hickombottom supplying the information I needed to continue the case (even the court number) so instituted an appeal on my own (Court No. 92–12–00794) so that I would not be dependant on a co-plaintiff who is unable or unwilling to cooperate. That action was dismissed May 3, 1993 by Judge Richard W. Goldberg * * *.

The court accepts these representations at face value. They reflect a desire by Mr. Duncan to proceed with his complaint against the defendant now. It is also true that the practice in matters such as this has advanced so far beyond the pleading requirements of the common law as to accept, for purposes of suit against the sovereign, letters of the kind sent by the plaintiffs. But this approach has not eliminated the requirement that complainants, whether pro se or represented by lawyers, be diligent from the beginning, and it has not set aside the common-law doctrine of laches, which is and has been based upon the maxim that equity aids the vigilant and not those who slumber on their rights. Black's Law Dictionary, p. 787 (5th ed. 1979). Rule 60(b) of the Rules of the Court of International Trade provides, in pertinent part:

> On motion of a party * * * and upon such terms as are just, the court may relieve a party * * * from a final judgment * * * for * * * (1) mistake, inadvertance, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) * * * not more than one year after the judgment * * * was entered * * *.

Plaintiff Duncan does not now meet any of these standards. He did not come forward during the 14 months between the filing and the dismissal of his complaint. He did not come forward with his second complaint until another 14–plus months had passed. And he has not now made this motion within one year of September 12, 1990, as required by the foregoing rule. As stated by the court in *Avon Products, Inc. v. United States*, 13 CIT 670, 672 (1989), "[n]either ignorance nor carelessness on the part of a litigant or his attorney provides grounds for relief under Rule 60(b)(1)." Finally, that workers who have lost their jobs and then been denied adjustment assistance by the government may complain in court without the assistance of counsel does not mean that

the court will attempt to deal directly with each and every member of their class, only with a seemingly appropriate representative.

Admittedly, plaintiff Higgombottom did not prove to be such a representative. But it was plaintiff Duncan's responsibility to know this and to supplant him in a timely manner. That this did not occur does not amount to the kind of mistake, inadvertence, surprise, excusable neglect or other reason justifying relief from the operation of the judgment. To hold otherwise on the record presented would undermine the due process to which every party defendant is entitled and to which every party plaintiff must adhere. Ergo, plaintiff Duncan's motion to vacate the default judgment dismissing this action must be, and it hereby is, denied.

The Clerk shall notify plaintiff Duncan of this decision forthwith.

(Slip Op. 93–133)

SACHS AUTOMOTIVE PRODUCTS CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENOR

Court No. 92–04–00271

[Defendant's motion to strike granted. Plaintiff's motion to compel production of missing portions of administrative record granted.]

(Decided July 19, 1993)

Appearances:

Fenwick & West (Roger Golden and *Christopher costa,* Esqs.), for plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice *(A. David Lafer,* Esq., Senior Trial Counsel), for defendant.

Frederick L. Ikenson, P.C., (Frederick L. Ikenson and *Joseph A. Perna,* Esqs.), for defendant-intervenor.

MEMORANDUM ORDER

NEWMAN, *Senior Judge:* Defendant moves pursuant to USCIT Rule 12(f) to strike Sachs' motion for judgment upon the agency record, without prejudice to refiling an expurgated brief. Plaintiff moves to compel defendant to produce certain missing objects and documents designated as part of the administrative record. For the following reasons, the court grants both motions.

In 17 CIT ____, Slip Op. 93–59 (April 26, 1993), the court determined that three documentary items were not presented to or obtained by Commerce and are accordingly outside the administrative record. Slip Op. at 8 (citing 19 U.S.C. § 1516a(b)(2)(A)(i)). Nevertheless, Sachs has cited to and appended one item that was the subject of that decision to its Rule 56.2 brief. *See* Plaintiff's App. "H" (Spetrini memo). Sachs has also impermissibly cited an unpublished decision in contravention to Fed. Cir. Rule 47.6.

Under USCIT Rule 12(f), a motion to strike constitutes an extraordinary remedy and should be granted where there has been a flagrant dis-

regard of the court's rules. *See Fujitsu General, Ltd. v. United States,* 15 CIT 432, 433 (1991). The court has compared Sachs' brief and appendix with the administrative record and determines that numerous objectionable citations do appear throughout Sachs' motion papers. The instant case, therefore, is not one where the court can conveniently disregard the improper citations. *Cf. Jimlar Corp. v. United States,* 10 CIT 671, 673, 647 F. Supp. 932, 935 (1986).

Nor would it be fair to the other parties to require them to respond to a submission replete with references dehors the record. Sachs is free to offer whatever *legal* arguments it chooses, including those it offered at the July 15, 1991 meeting with Commerce; however, it must respect the parameters of the court's standard of review.

In the unlikely event that the court's decision in Slip Op. 93–59 was in some way unclear to Sachs, the court trusts that this decision will spell matters out more clearly. Sachs' expurgated to be sanitized of citations to the Wolfmaier affidavits, as well as all materials determined to be outside the record in Slip Op. 93–59, and any other impermissible citation to materials outside the record. Sachs will not be required to prepare an abridged documentary appendix; the court will simply disregard the offending items currently appended to Sachs' brief. However, if the court determines that Sachs' next submission contains similar violations of the rules and of court orders, resort may be had to such remedies that the Rules provide (e.g., USCIT R. 11, 41(b)(3)).

Finally, the court is informed that three items designated as part of the record are within the custody of Commerce and are not presently on file with the court.[1] The court further understands, that although these items are currently the subject of a subpoena from the United States District Court for the District of Maryland, they are available upon request by the parties or the court. *See* Plaintiff's App. "B," Letter of Thomas H. Fine, Esq. Since there is no disagreement that these matters are part of the record for review, the court directs that they be filed with the Clerk's Office within the time specified by this order.

ORDER

It is hereby ORDERED that defendant's motion to strike Sachs' brief in support of its motion for judgment upon the agency record pursuant to Rule 56.2 is GRANTED. Sachs is directed to file an expurgated brief on or before July 30, 1993. Defendant and intervenor Federal-Mogul will file responsive briefs on or before August 30, 1993. Sachs will file its reply on or before September 10, 1993.

It is further ORDERED that Sachs' motion is GRANTED and that record items designated as A.R. 14, 15, and 16 are accordingly to be transmitted to the Clerk of the Court no later than two weeks from the service of Sachs' reply.

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[1] These items are A.R. 14 (Sachs' clutch releasers), A.R. 15 (bearings of other manufacturers), and A.R. 16 (color chart).

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/81 7/15/93 Musgrave, J.	Sandvik Coromant Co.	92–01–00038	2849.90.3000 10.5%	3823.30.0000 3.6%	Agreed statement of facts	New York Cemented carbide powders "Mixed Powder," "Hard Metal Powder," "RTP Powder," *etc.*

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